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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945 6

No. 540 31

DR. FURMAN ANGEL, PETITIONER,

vs.

W. H. BULLINGTON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 19, 1945.

CERTIORARI GRANTED DECEMBER 3, 1945.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 540

DR. FURMAN ANGEL, PETITIONER,

vs.

W. H. BULLINGTON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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—2403

[fol. a]

IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5310

DR. FURMAN ANGEL, Appellant,

vs.

W. H. BULLINGTON, Appellee

Appeal from the District Court of the United States for the Western District of North Carolina, at Asheville

Appendix to Brief for Appellant—Filed May 22, 1945

[fol. 1] IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

W. H. BULLINGTON

vs.

FURMAN ANGEL

COMPLAINT

1. The plaintiff is a citizen of the State of Virginia, and the defendant is a citizen of the State of North Carolina.

2. On or about the 4th day of March, 1940, the plaintiff entered into a contract in writing with the defendant, in which contract the defendant agreed to purchase from the plaintiff certain real estate in Roanoke County, Virginia, and the defendant agreed to pay upon the tender of a proper deed of conveyance with General Warranty and Title, the sum of $11,000.00, $100.00 of which amount defendant had paid upon the signing and execution of said contract; that of said sum defendant agreed to pay the sum of $400.00 in cash upon the delivery of said deed, to assume the payment of a certain F. H. A. loan in the sum of $7,400.00 at the rate of $55.90 per month, and further to execute and deliver to the plaintiff sixteen monthly notes to bear date [fol. 2] with said deed, fifteen of said notes being in the

sum of $200.00 cash, and one, the last, in the sum of $100.00, the first of which said notes should become due one month after the date thereof, and one each successive month until all should have been paid.

3. Pursuant to said contract and terms of same, the plaintiff on or about the 4th day of March, 1940, delivered to defendant at his discretion and request a good and sufficient warranty deed, conveying title to said land described in said contract to the defendant.

4. The defendant in partial performance of said contract paid to the plaintiff the sum of $400.00 in cash, and thereafter signed and delivered to the plaintiff, pursuant to the terms of said contract sixteen certain interest-bearing negotiable notes, each dated March 5, 1940, payable to the plaintiff at the Mountain Trust Bank of Roanoke, Virginia, the first fifteen of said notes being in the sum of $200.00, and one, the last, being in the sum of $100.00, the first of said notes payable on the 5th day of April, 1940, and one on the 5th day of each successive month thereafter until all of said notes should have been paid, which said notes bore interest at the rate of 6% per annum from date, waived homestead and all other exemptions, waived demand, presentment, protest and notice of non-payment or protest, and provided that the defendant would pay as an attorneys' fee 10% of the principal and interest of said notes if the said notes were placed in the hands of an attorney for collection; and that said notes were placed in the hands of R. R. Rush, who is a duly practicing attorney at law, for the purpose of collection.

[fol. 3] 5. That likewise on the 5th day of March, 1940, the defendant executed, signed, sealed, acknowledged, and delivered to the plaintiff a certain deed of trust, dated the 5th day of March, 1940, conveying unto Harvey B. Apperson and R. R. Rush, Trustees, the said certain tract or parcel of land lying and being in Roanoke County, Virginia, and known as the easterly portion of Lot 2 according to the Map of Deyerle Brothers Subdivision, which map is of record in the Clerk's Office of the Circuit Court of Roanoke County, Virginia, in Plat Book 2, page 97, the purpose of which said deed of trust was, and it did, secure unto the undersigned the payment of the aforesaid and described notes.

6. That the said deed of trust provided among other things that should default be made in the payment of any part of the debt secured in said deed of trust, principal, or interest, at the maturity of such part, or in the event of a breach of any of the covenants entered into or imposed upon the defendant, then the entire obligation of the said deed of trust and the whole debt thereby secured should, at the option of the beneficiary, become forthwith due and payable; that defendant did fail to pay one of said notes in the sum of $200.00 which became due April 5, 1940, and that the said beneficiary exercised his option so to do and did declare the whole of the aforesaid described notes executed by the defendant, forthwith due and payable.

7. That said deed of trust likewise provided that the defendant would pay all taxes, levies, and assessments upon said property, and that defendant would keep the [fol. 4] improvements on the property insured against fire in some solvent insurance company approved by the Trustee for the benefit of the beneficiaries hereunder in the sum of at least $3,000.00, and would deposit with the Trustee the policies with standard loss payable clauses with full contribution in favor of the Trustee as his interest might appear.

8. That notwithstanding the defendant's said several promises, agreements, and undertakings the defendant did fail and refuse, and although often so requested to do has continued to fail and refuse, to pay said notes of $200.00 each, one of which became due on the 5th day of April, 1940, and another of which because due on the 5th day of May, 1940, or any of said notes. That the defendant likewise failed and refused to pay said taxes and assessments on said property, and failed and refused to deliver and deposit with the trustees under said deed of trust or either of them, policy or policies of insurance as in said deed of trust provided.

9. That the defendant likewise assumed and agreed to pay off as it matured a certain F. H. A. loan, dated February 28, 1940, securing the payment of the sum of $7,400.00 payable in monthly installments of $55.90, which said installments included 1/12 of the annual hazard insurance premium and 1/12 of the annual taxes and assessments

due to the County of Roanoke, Virginia. That an installment of said loan was due on April 1st and May 1st, but that defendant wholly failed and refused, and still fails and refuses, to pay the same.

10. That the plaintiff, who was, and is, the legal holder [fol. 5] of the said sixteen notes secured in said deed of trust from the defendant to Harvey B. Apperson and R. R. Rush, Trustees, did elect to declare the whole amount of said debt secured by said deed of trust due and payable, and by reason of defendant's failure to pay said installments of $200.00, and his failure to perform the said other covenants and agreements in said deed of trust confained, did direct R. R. Rush, one of said Trustees under said deed of trust, to execute the powers therein conferred upon him and to sell said property to accomplish the purposes of said trust. That the said R. R. Rush, Trustee, did after advertising the said property for sale at public auction in compliance with the terms of said deed of trust, offer the same for sale at public auction on the 29th day of May, 1940, at which sale the plaintiff became the purchaser thereof for the sum of $25.00. That the said property was sold and purchased by the plaintiff for the said sum of $25,00, subject to the said deed of trust securing the payment of $7,400.00 to the Life and Casualty Insurance Company of Tennessee, Inc.

11. That the said Trustee, as required by the law of the State of Virginia, did file with the Commissioner of Accounts of the Circuit Court of Roanoke County, Virginia, a copy of his settlement showing the manner in which he performed his duties as Trustee and disbursed the funds coming into his hands as such Trustee. A copy of said Trustee's settlement is hereto attached and hereby expressly made a part of this complaint.

12. That the said Trustee caused to be endorsed upon the first of said notes of $200.00 a credit of $3.83 as of [fol. 6] the 29th day of May, 1940, to which credit defendant is entitled upon said note.

Wherefore, the plaintiff demands judgment of the defendant for the sum of $3,100.00, with interest from the 5th day of March, 1940, together with 10% of said amount as attorneys' fees, subject to a credit of $3.83, as of the

29th day of May, 1940, and the further sum of $99.85 with interest from the 29th day of May, 1940, and costs.

W. R. Francis, Attorney for the Plaintiff, Waynesville, North Carolina; R. R. Rush, Attorney for the Plaintiff, Roanoke, Virginia.

Duly sworn to by W. H. Bullington. Jurat omitted in printing.

[fol. 7] IN UNITED STATES DISTRICT COURT

ANSWER

[Title omitted]

The defendant, Furman Angel, answering the complaint of plaintiff, for his answer, says:

1.

That the allegations of paragraph one are not denied.

2.

That the allegations of paragraph two are admitted. Defendant herewith attaches to this Answer a copy of the contract referred to in paragraph two of the complaint as Exhibit A, and asks that same be taken as a part of this answer.

3.

In answer to paragraph three, defendant admits that on the 5th day of March, 1940, the plaintiff delivered to the defendant a deed, copy of which is hereto attached, marked [fol. 8] Exhibit B, and asked to be taken as a part of this Answer. Except as above admitted, the allegations of paragraph three of the complaint are untrue and denied.

4.

In answer to paragraph four, defendant admits that he paid to the plaintiff the sum of Five Hundred ($500.00) Dollars in cash, and delivered to the plaintiff sixteen notes, each bearing date March 5, 1940, payable to the plaintiff; that said notes speak for themselves as to their contents, and this defendant denies all allegations which are in conflict with the terms and provisions of said notes. Except as

above admitted, the allegations of paragraph four of the complaint are untrue and denied.

5.

In answer to the allegations of paragraph five, defendant admits that on the 5th day of March, 1940, the defendant executed and delivered to the plaintiff a certain deed of trust conveying to Harvey B. Apperson and R. R. Rush, Trustees, certain property; that said deed of trust speaks for itself and all allegations not in conformity with the provisions thereof are hereby denied. A copy of said deed of trust is hereto attached, marked Exhibit C and asked to be taken as a part of this answer. Except as admitted, the allegations of paragraph five are untrue and denied.

6.

In answer to paragraph six, this defendant says that the deed of trust heretofore set out as Exhibit C speaks for itself and for all the terms and conditions therein contained. [fol. 9] That all allegations in conflict with the terms of said deed of trust are denied.

7.

That in answer to paragraph seven, this defendant says that the deed of trust heretofore set out as Exhibit C speaks for itself and for all the terms and conditions therein contained. That all allegations in conflict with the terms of said deed of trust are denied.

8.

In answer to paragraph eight, defendant admits that he did not pay the note which fell due on April 5, 1940, and the one which fell due on May 5, 1940; nor has he, due to the fact that plaintiff has purchased the property from the trustee and is the owner of same, paid any of the notes; nor has he paid any of the taxes or insurance on said property.

9

That in answer to paragraph nine, this defendant says that the deed of trust heretofore set out as Exhibit C speaks for itself and for all the terms and conditions therein contained. That all allegations in conflict with the terms

of said deed of trust are denied. Further answering said paragraph nine, defendant admits that since the plaintiff purchased said property from the trustees and became the owner thereof he, the defendant, did not pay the installments coming due April 1, and May 1, set out in paragraph nine of the complaint.

10.

In answer to paragraph ten, defendant says he has [fol. 10] no knowledge or information sufficient to form a belief as to the truth of the allegations therein contained and therefore same are denied, with the exception, however, defendant is advised, informed and believes that R. R. Rush, trustee, did advertise and sell the property in question, at which time plaintiff became the purchaser thereof.

11.

In answer to paragraph eleven, defendant says he has no knowledge or information sufficient to form a belief as to the truth of the allegations therein contained and therefore same are denied.

12.

In answer to paragraph twelve, defendant says he has no knowledge or information sufficient to form a belief as to the truth of the allegations therein contained and therefore same are denied.

And, for another and further answer and defense to plaintiff's alleged cause of action, this defendant says:

1.

That when defendant purchased from plaintiff the property referred to in the complaint and executed the contract, notes and deed of trust referred to herein, he paid to the plaintiff the sum of $500.00 in cash which sum the plaintiff has at all times retained, and for which this defendant received no benefit.

2.

That prior to March 5, 1940, the date upon which [fol. 11] the deed of trust and notes were executed, the Legislature of North Carolina, by Chapter 36 of the Pub-

lic Laws of 1933, C.S. 2593 (F) had enacted a law adopting the policy of refusing to permit deficiency judgment in all sales of real property by mortgagees and/or trustees, under the powers of sale contained in any mortgages or deeds of trust executed after the enactment of said Statute, or where judgments or decrees are given for the foreclosure of any mortgage or deed of trust after the ratification of said act. That said Statute, among other things provided as follows:

> "In all sales of real property by mortgagees and /or trustees under the powers of sale contained in any mortgage or deed of trust hereafter executed, or where judgment or decree is given for the foreclosure of any mortgage executed after the ratification of this section to secure payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by said mortgage or deed of trust shall not be entitled to a deficiency judgment on account of said mortgage, deed of trust, or obligation secured by the same"

3.

That at the time of the sale of the property under the deed of trust which was conducted for the purpos/ of collecting for plaintiff the balance of unpaid purchase price of said property represented by notes and deed of trust. above referred to, plaintiff became the purchaser of said property. That this action on the part of the plaintiff [fol. 12] is brought for the purpose of obtaining against the defendant, judgment for the deficiency between the contract price at which defendant purchased said property and the amount which said property, at the bid of plaintiff, brought at the sale thereof under the deed of trust.

4.

That by reason of the enactment of the Statute above referred to and the fact that this action is brought to recover a deficiency judgment which is in conflict with said Act, the plaintiff's action can not be sustained, and defendant specifically pleads said Act and said sections thereof in bar of plaintiff's right to recover herein.

And for another and second further answer and defense to plaintiff's alleged cause of action, defendant says:

1.

That on the 29th day of July, 1940, the plaintiff, W. H. Ballington, herein, instituted an action against this defendant in the Superior Court of Macon County, North Carolina, seeking to recover of this defendant judgment on the identical notes secured by the identical deed of trust sued upon in this action, alleging in the complaint that the plaintiff had sold the property in question to the defendant, and that the defendant had failed to make payments, as alleged in this action; that the allegations of the complaint in said cause are almost in the exact language of the complaint filed in this cause; that a copy of the summons [fol. 13] and complaint so filed by the plaintiff in said first action, are hereto attached marked Exhibit D and asked to be made and taken as a part of this answer.

2.

That to said complaint this defendant filed a demurrer, copy of which is attached hereto, marked Exhibit E and asked to be taken as a part of this answer; that said demurrer was based upon the ground that the State of North Carolina had enacted Chapter 36 of the Public Laws of 1933 C.S. 2593 (F), and that therefore plaintiff could not maintain said action; that when the cause come on for trial in the Superior Court, His Honor Felix E. Alley, Judge presiding, overruled the demurrer, copy of which demurrer is hereto attached, marked Exhibit E, as aforesaid.

3.

That thereupon the defendant appealed said ruling by the Honorable Felix E. Alley, to the Supreme Court, the Court of last resort in the State of North Carolina, which said Court reversed said judgment and held that the Statute, to-wit, said Chapter 36 of the Public Laws of 1933 of North Carolina, C.S. 2593 (F), was binding on all sales coming under the provisions of said statute, including those predicated upon notes secured by mortgages or deeds of trust executed in another State upon realty lying therein. That the opinion of said Court is recorded in Volume 220,

Page 18, North Carolina Reports, and is asked to be taken as a part of this answer.

4.

[fol. 14] That in conformity with said opinion, a judgment was entered in the Superior Court of Macon County, finally terminating said action in favor of this defendant and against the plaintiff herein. A copy of said judgment is hereto attached, marked Exhibit F and asked to be made a part hereof.

So, this defendant now avers and says that the judgment of the Supreme Court of North Carolina, rendered at the Fall Term, 1941, as aforesaid, and the judgment of the Superior Court of Macon County, N. C., rendered in conformity therewith, based upon an identical cause of action with the one herein set out, constitutes an estoppel and bar against the plaintiff herein and precludes him from maintaining this action; and said action together with the pleadings and judgments therein set out, are hereby specifically pleaded as an estoppel and in bar of plaintiff's right to maintain this action.

Wherefore, having fully answered, this defendant prays the Court that plaintiff take nothing by reason of his action; that his cause of action be dismissed and that defendant go hence without day and recover his costs herein incurred.

Jones & Jones, Jones, Ward & Jones, Attorneys for Defendant.

[fol. 15] *Duly sworn to by Dr. Furman Angel. Jurat omitted in printing.*

[fol. 16] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO FACTS

It is hereby stipulated between the plaintiff and the defendant that the above action is submitted to the court for decision upon the following facts:

(1) The plaintiff is a citizen of the State of Virginia, and the defendant is a citizen of the State of North Carolina.

(2) On or about the 4th day of March, 1940, the plaintiff entered into a contract in writing with the defendant, in

which contract the defendant agreed to purchase from the plaintiff certain real estate in Roanoke County, Virginia, and the defendant agreed to pay upon the tender of a proper deed of conveyance with General Warranty of Title, the sum of $11,000.00, $100.00 of which amount defendant had paid upon the signing and execution of said contract; that of said sum defendant agreed to pay the sum of $400.00 in cash upon the delivery of said deed; to assume the payment of a certain F. H. A. loan in the sum of $7,400.00 at the rate [fol. 17] of $55.90 per month, and further to execute and deliver to the plaintiff sixteen monthly notes to bear date with said deed, fifteen of said notes being in the sum of $200.00 cash, and one, the last, in the sum of $100.00, the first of which said notes should become due one month after the date thereof, and one each successive month until all should have been paid, that a true copy of said contract is attached to defendant's answer marked "Exhibit A".

(3) Pursuant to said contract and terms of same, the plaintiff on or about the 5th day of March, 1940, delivered to defendant a warranty deed conveying title to said land described in said contract; that a true copy of said deed is attached to defendant's answer marked "Exhibit B".

(4) The defendant in partial performance of said contract paid to the plaintiff the sum of $400.00 in cash, in addition to $100 paid upon execution of contract, and thereafter signed and delivered to the plaintiff; pursuant to the terms of said contract sixteen certain interest-bearing negotiable notes, each dated March 5, 1940, payable to the plaintiff at the Mountain Trust Bank of Roanoke, Virginia, the first fifteen of said notes being in the sum of $200.00, and one, the last, being in the sum of $100.00, the first of said notes payable on the 5th day of April, 1940, and one on the 5th day of each successive month thereafter until all of said notes should have been paid, which said notes bore interest at the rate of 6% per annum from date.

(5) That likewise on the 5th day of March, 1940, the [fol. 18] defendant executed, signed, sealed, acknowledged, and delivered to the plaintiff a certain deed of trust, dated the 5th day of March, 1940, conveying unto Harvey B. Apperson and R. R. Rush, Trustees, the said certain tract of parcel of land lying and being in Roanoke County, Virginia, and known as the easterly portion of Lot 2 according

to the Map of Deyerle Brothers Subdivision, which map is of record in the Clerk's office of the Circuit Court of Roanoke County, Virginia, in Plat Book 2, Page 97, the purpose of which said deed of trust was, and it did, secure unto the undersigned the payment of the aforesaid and described notes; that true copy of said deed of trust is attached to defendant's answer and marked "Exhibit C".

(6) That the said deed of trust provided among other things that should default be made in the payment of any part of the debt secured in said deed of trust, principal, or interest, at the maturity of such part, or in the event of a breach of any of the covenants entered into or imposed upon the defendant, then the entire obligation of the said deed of trust and the whole debt thereby secured, should, at the option of the beneficiary, become forthwith due and payable; that defendant failed to pay one of said notes in the sum of $200.00 which became due April 5, 1940, and that the said beneficiary exercised his option so to do and did declare the whole of the aforesaid described notes executed by the defendant, forthwith due and payable.

(8) That defendant did fail to pay said notes of $200.00 [fol. 19] cash, one of which became due on the 5th day of April, 1940, and another of which became due on the 5th day of May, 1940, or any of said notes. That the defendant likewise failed to pay said taxes and assessments on said property and failed to deliver and deposit with the trustees under said deed of trust or either of them policy or policies of insurance.

(9) That the defendant likewise assumed and agreed to pay off as it matured a certain F. H. A. loan, dated February 28, 1940, securing the payment of the sum of $7,400.00 payable in monthly installments of $55.90, which said installments included 1/12 of the annual hazard insurance premium and 1/12 of the annual taxes and assessments due to the County of Roanoke, Virginia. That an installment of said loan was due on April 1st and May 1st, but that defendant wholly failed and refused, and still fails and refuses, to pay the same.

(10) That the plaintiff, who was, and is, the legal holder of the said sixteen notes secured in said deed of trust from the defendant to Harvey B. Apperson and R. R. Rush,

Trustees, did elect to declare the whole amount of said debt secured by said deed of trust due and payable and by reason of defendant's failure to pay said installments of $200.00 and his failure to perform the said other covenants and agreements in said deed of trust contained did direct R. R. Rush, one of said Trustees, under said deed of trust, to execute the powers therein conferred upon him and to sell said property to accomplish the purposes of said trust. That the said R. R. Rush, Trustee, did after advertising the [fol. 20] same property for sale at public auction in compliance with the terms of said deed of trust, offer the same for sale at public auction on the 29th day of May, 1940, at which sale the plaintiff became the purchaser thereof for the sum of $25.00. That the said property was sold and purchased by the plaintiff for the said sum of $25.00 subject to the said deed of trust securing the payment of $7,400.00 to the Life and Casualty Insurance Company of Tennessee, Inc., a copy of said advertisement of sale is hereto attached marked "Exhibit X".

(11) That the said Trustee, as required by the law of the State of Virginia, did file with the Commissioner of Accounts of the Circuit Court of Roanoke County, Virginia, a copy of his settlement showing the manner in which he performed his duties as Trustee and disbursed the funds coming into his hands as such Trustee. A copy of said Trustee's Settlement is attached and made a part of the complaint, filed herein.

(12) That the said Trustee caused to be endorsed upon the first of said notes of $200.00 a credit of $3.83 as of the 29th day of May, 1940, to which credit defendant is entitled upon said note.

(13) That the defendant took possession of said real estate, and occupied the same for a period of a few days in excess of one month immediately following the execution and delivery of said deed from said plaintiff to said defendant.

(15) That the court will take due notice of the applicable statutes of North Carolina and Virginia which may be referred to by counsel in argument.

[fol. 21] (16) That on the — day of —, 1940, the plaintiff, W. H. Bullington, herein, instituted an action against

this defendant in the Superior Court of Macon County, North Carolina, seeking to recover of this defendant judgment on the identical note secured by the identical deed of trust sued upon in this action, alleging in the complaint that the plaintiff had sold the property in question to the defendant, and that the defendant had failed to make payments as alleged in this action; that the allegations of the complaint in said cause are almost in the exact language of the complaint filed in this cause; that a true copy of the summons and complaint so filed by the plaintiff in said first action, are attached to defendant's answer marked "Exhibit D".

(17) That to said complaint this defendant filed a demurrer, copy of which is attached to defendant's answer marked "Exhibit E"; that said demurrer was based upon the ground that the State of North Carolina had enacted Chapter 36 of the Public Laws of 1933, C. S. 2593 (F), and that therefore could not maintain said action; that when the cause came for trial in the Superior Court, His Honor Felix E. Alley, Judge presiding, overruled the demurrer, copy of which demurrer is attached to said answer marked "Exhibit E".

(18) That thereupon the defendant appealed said ruling by the Honorable Felix E. Alley, to the Supreme Court, the Court of last resort in the State of North Carolina, which said Court reversed said judgment; that the opinion of said Court is reported in Volume 220, Page 18, North Carolina [fol. 22] Reports, and 16, S. E. (2nd) 411, a copy of which is hereto attached marked "Exhibit Y".

(19) That in conformity with said opinion, a judgment was entered in the Superior Court of Macon County, finally terminating said action in favor of this defendant and against the plaintiff herein. A copy of said judgment is attached to said answer marked "Exhibit F".

R. Roy Rush; W. R. Francis; Jones & Jones; Jones, Ward & Jones, Attorneys for Plaintiff.

[fol. 23] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA, ASHEVILLE DIVISION.

W. H. BULLINGTON,

vs.

FURMAN ANGEL

JUDGMENT

Upon the stipulation or agreed statement of facts in this case, I am of the opinion that the plaintiff is entitled to recover from the defendant the sum of Three Thousand One Hundred Dollars ($3,100.00), and it is therefore

Ordered and Adjudged that the plaintiff recover of the defendant the sum of Three Thousand One Hundred Dollars ($3,100.00) with interest thereon from the 5th day of March, 1940.

It Is Further Ordered that the defendant pay the costs of the action as taxed by the Clerk.

This the 3d day of August, 1944.

E. Y. Webb, United States District Judge.

[fol. 24] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA, ASHEVILLE DIVISION.

W. H. BULLINGTON,

vs.

FURMAN ANGEL

MEMORANDUM OPINION

The sole question presented by the agreed statement of facts is whether the provisions of the Law of North Carolina, Chapter 36, Public Laws 1933, bar the plaintiff from maintaining this suit in this Court. This statute undertakes to prevent any person from securing a deficiency judgment "On account of mortgage, deed of trust or obligation secured by same."

This plaintiff, in spite of the statute, brought suit in the Superior Court of North Carolina, to secure judgment on the unpaid notes amounting to Three Thousand One Hun-

dred Dollars ($3,100.00) which is admitted was a deficiency. The Superior Court Judge held that the plaintiff was entitled to recover but, when the case was carried to the Supreme Court of North Carolina, it reversed the holding of the Superior Court Judge and denied the plaintiff the right to recover in the state court.

[fol. 25] Judge Schenck, in writing the opinion of the Court, among other things said, "It will be noted that the limitations created by the statute is upon the *jurisdiction* of the Court, in that it is declared that the holders of notes given to secure the purchase price of real property 'shall not be entitled to a deficiency judgment on account' thereof. This closes the courts of this state to one who seeks a deficiency judgment on a note given for the purchase price of the property * * * It is a limitation of the jurisdiction of the courts of this state."

Do this statute and the decision of the Supreme Court likewise limit the jurisdiction of the federal court?

I think not. During my nearly twenty-five years on the federal bench, I have scrupulously respected and guarded the rights of the states, but I cannot now go so far as to hold that the Legislature of North Carolina can deprive a non-resident of the right to come into this Court and sue a local defendant to recover an amount in excess of three thousand dollars which is admittedly due the plaintiff. The plaintiff is a resident of Virginia. The land mortgaged lies in Virginia. The deed of trust signed by the defendant was a Virginia contract and the notes signed by the defendant were made payable at a bank in Roanoke, Virginia.

It is the contention of the defendant that the state has established its public policy closing the doors of its courts to deficiency judgments and that a federal court sitting in this state is bound by the act of the Legislature.

[fol. 26] The jurisdiction of this Court so far as the present case is concerned is conferred by the United States Statute in the following language: "The district Courts shall have original jurisdiction as follows:

> "First, Of all suits of a civil nature, at common law or in equity * * * where the matter in controversy exceeds the sum or value of three thousand dollars and * * * is between citizens of different states * * *"

In the case of *Barrow Steamship Company* v. *King*, 170 U. S. 100, the Court said: "The jurisdiction so conferred upon the national courts cannot be abridged or impaired by any statute of a state."

In the case of *Stevenson* v. *Grand Trunk Western Railroad Company*, 110 Federal Reporter, Second Series, Page 401, it was held that the State of Illinois could not close the doors of the federal courts in Illinois for a wrongful death occurring in Michigan. The Legislature of Illinois passed a statute forbidding the bringing or prosecution of any action in Illinois to recover damages for death by wrongful act occurring outside the state.

Judge Major, Circuit Judge, speaking for the Court, among other things, said: "Defendant argues that the decision in *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64 requires a federal court to follow a state policy as expressed in legislative enactment or the decisions of its courts. We do not think this case has any application, even though the Court was considering the construction to be given Section 34 of the Federal Judiciary Act."

[fol. 27] "The jist of that opinion is found in the statement of the Court: 'Except in matters governed by the Federal constitution or by acts of the Congress, the law to be applied in any case is the law of the state.' It will be observed that 'matters governed by the federal constitution or by acts of Congress' are excepted, as might be expected."

Judge Major continues: "If the Congress or the federal courts have no power or supervision over the state, when acting through its legislature or its court, it must be equally true that the latter is without power of control or supervision over the federal courts. That which was held in the Tompkins case must be confined, we think, solely to matters of substance and not of jurisdiction. To hold otherwise would lead to the illogical conclusion that the jurisdiction of federal courts not only may be limited, but abrogated by the edict of the state legislature or decision of the supreme Court of the state in which the federal court sits. We assume that the state has the power to determine the jurisdiction of its own courts as it sees fit, but it does not follow that likewise it may determine the jurisdiction of the federal court under the theory that the latter is required to follow the public policy of the former.

This case was carried to the Supreme Court of the United

States upon a writ of certiorari but was later dismissed without opinion.

I might say that I have read, I think, every decision which bears on this question, and certainly all the decisions referred to by counsel in their argument and briefs, and [fol. 28] this case comes nearest fitting the case at bar than any one that I have been able to find.

The contract sought to be enforced in this Court by the plaintiff is a legal obligation under the laws of the State of Virginia; indeed, there is nothing immoral or illegal about it in North Carolina. The plaintiff is a resident of Virginia, as before stated, and is, therefore, a non-resident of the State of North Carolina and is seeking to enforce in this Court an obligation which is regarded as legal in his state where the contract was made and where the notes were payable.

I must, therefore, conclude that the plaintiff is entitled to seek the jurisdiction of this Court regardless of the act of the Legislature of North Carolina, Public Laws of 1933, and is entitled to a judgment for Three Thousand One Hundred Dollars ($3,100.00), and I have so ordered.

This the 3d day of August, 1944.

E. Y. Webb, United States District Judge.

[fol. 29] PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 5310

DR. FURMAN ANGEL, Appellant;

versus

W. H. BULLINGTON, Appellee

Appeal from the District Court of the United States for the Western District of North Carolina, at Asheville

September 22, 1944, the transcript of record is filed and the cause docketed.

September 25, 1944, the appearance of R. Roy Rush is entered for the appellee.

September 26, 1944, the appearance of Gilmer Jones, R. S. Jones, G. Lyle Jones and George H. Ward is entered for the appellant.

Same day, statement under section 3 of Rule 10 is filed.

September 27, 1944, the appearance of W. Roy Francis is entered for the appellee.

October 2, 1944, stipulation to continue case to the June Term is filed and submitted to Parker, Soper and Dobie, Circuit Judges.

ORDER CONTINUING CASE TO JUNE TERM, 1945—Filed and Entered October 2, 1944

(Style of Court and Title Omitted)

Upon the Stipulation and Agreement of counsel for the respective parties in the above-entitled case,

It Is Ordered By The Court that this case be, and [fol. 30] the same is hereby, continued from the November term, 1944, to the June term, 1945 of this Court.

October 2, 1944.

John J. Parker, Senior Circuit Judge.

May 22, 1945, brief on behalf of appellant is filed.

Same day, appendix to brief of appellant is filed.

June 4, 1945, brief on behalf of appellee is filed.

ARGUMENT OF CAUSE

June 12, 1945 (June Term, 1945), cause came on to be heard before Parker, Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

[fol. 31] OPINION—Filed July 19, 1945

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5310

DR. FURMAN ANGEL, Appellant,

versus

W. H. BULLINGTON, Appellee

Appeal from the District Court of the United States for the Western District of North Carolina, at Asheville. Civil Action

(Argued June 12, 1945. Decided July 19, 1945)

Before Parker, Soper and Dobie, Circuit Judges

R. S. Jones (Jones & Jones and Jones, Ward & Jones on brief) for Appellant; and R. Roy Rush (W. Roy Francis on brief) for Appellee.

[fol. 32] DOBIE, Circuit Judge:

W. H. Bullington, as vendor, and Furman Angel, as vendee, entered (in Virginia) into a contract (to be performed in Virginia) for the sale of land in Virginia. A deed was duly executed, part of the purchase price was paid, and notes (secured by deed of trust on the land) for the balance of the purchase price were made by the vendee. Upon default in the payment of one of these notes, the vendor, under an accelerating clause in the deed of trust, declared the other notes due and called on the trustees to sell the land. The proceeds of the sale were applied to the payment of the notes, but there was still a deficiency due on these notes.

The vendor sued the vendee for the deficiency in a court of the State of North Carolina. That court overruled

a demurrer of the defendant, but this ruling was reversed by the Supreme Court of North Carolina, which held that such a deficiency judgment could not be granted by a state court of North Carolina by virtue of a statute of that state (N. C. Code of 1939, Michie, § 2593(f)). *Bullington* v. *Angel*, 220 N. C. 18, 16 S. E. (2d) 411.

The vendor thereupon instituted against the vendee a civil action for the deficiency in the United States District Court for the Western District of North Carolina. Judge Webb, sitting in that court without a jury, entered judgment in favor of the vendor for the deficiency.

This appeal of the vendee presents a single question. Does the North Carolina statute prevent, as to the contract [fol. 33] in question (which is conceded to be valid under the law of Virginia) the recovery of a deficiency judgment in a District Court of the United States, sitting in North Carolina? Judge Webb answered (Correctly, we think) this question in the negative.

The statute of North Carolina reads, in part:

"In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust hereafter executed, or where judgment or decree is given for the foreclosure of any mortgage executed after the ratification of this act to secure payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same * * *"

This statute did not render void the obligation, secured by the mortgage or deed of trust, insofar as it furnishes a basis for a deficiency judgment in a foreclosure proceeding. The Supreme Court of North Carolina has construed the statute to be merely a limitation on the jurisdiction of the State courts which closes them to one who seeks such a judgment. When the instant case was before the Supreme Court of North Carolina in *Bullington* v. *Angel*, 220 N. C. 18, Associate Justice Schenck meticulously stated:

"It will be noted that the limitation created by the statute is upon the jurisdiction of the court in that it is declared that the holder of notes given to secure the purchase price of real property 'shall not be entitled to a deficiency judg-

[fol. 34] ment on account' thereof. This closes the courts of this State to one who seeks a deficiency judgment on a note given for the purchase price of real property. The statute operates upon the adjective law of the State, which pertains to the practice and procedure, or legal machinery by which the substantive law is made effective, and not upon the substantive law itself. It is a limitation of the jurisdiction of the courts of this State."

This interpretation of the statute, which is binding on us, makes it crystal clear that the statute is a limitation on the jurisdiction of the courts; that it operates in the field of adjective or procedural law, not in the realm of the substantive law of rights. It is well settled that when a claim or cause of action exists, and the jurisdictional requisites prescribed by the Constitution and laws of the United States obtain, a federal District Court has jurisdiction; and this jurisdiction cannot be limited or taken away by state statutes. This has been consisfently held by the Supreme Court of the United States in a long line of cases. See, *Suydam* v. *Broadnax* (1840), 14 Pet. 67, 10 L. Ed. 357; *Union Bank* v. *Vaiden* (1855), 18 How. 506, 15 L. Ed. 472; *Chicago & N. W. Ry. Co.* v. *Whitton* (1871), 13 Wall. 270, 20 L. Ed. 571; *David Lupton's Sons* v. *Automobile Club of America* (1912) 225 U. S. 489, 32 S. Ct. 711, 56 L. Ed. 1177. See, also, Moore, Federal Practice, V. I. § 207, p. 208; Dobie on Federal Procedure, § 86, p. 336; Article 3 § 2 of the Federal Constitution, 28 U. S. C. A. § 41(1).

The question before us is not unlike that considered in *David Lupton's Sons* v. *Auto. Club of Am.*, 225 U. S. 489, [fol. 35] where it was held that the Federal court in New York was not deprived of jurisdiction to entertain a suit for breach of contract brought by a Pennsylvania corporation which had done business in New York contrary to its statutes which prohibited a foreign corporation from doing business therein without complying with certain prescribed conditions. The courts of New York had construed the statute not to invalidate a contract made by a corporation under such conditions, but merely to provide that no action on such a contract should be maintained in the courts of the State. Holding that such a statute did not limit the jurisdiction of the Federal courts the Supreme Court said: (pp. 499-500)

"It must follow, * * * that the Lupton Company, whether or not it was doing a local business in New York, had the right to bring this suit in the Federal court. The State could not prescribe the qualifications of suitors in the courts of the United States, and could not deprive of their privileges those who were entitled under the Constitution and laws of the United States to resort to the Federal courts for the enforcement of a valid contract."

Associate Justice Schenck held that the North Carolina statute under consideration was applicable (as to the courts of the State of North Carolina) to claims "secured by real estate in a State other than North Carolina". (220 N. C. 21). This raises the interesting questions whether the statute as thus interpreted runs afoul of the full faith and credit clause of Article 4 §1 of the Federal Constitution or the due process [fol. 36] Clause of § 1 of the Fourteenth Amendment. We do not here pass upon these questions. See, *Hartford Acc. & Ind. Co. Delta*, 292 U. S. 123; *Broderick* v. *Rosner*, 294 U. S. 629; *Milwaukee County* v. *M. E. White Co.*, 296 U. S. 268; *Home Ins. Co.* v. *Dick*, 281 U. S. 397; *John Hancock Mutual Life Ins. Co.* v. *Yates*, 299 U. S. 178; *Bradford Electric Light Co.* v. *Clapper*, 286 U. S. 145; *Alaska Packers Ass'n.* v. *Industrial Acc. Comm'n.*, 294 U. S. 532; *Griffin* v. *McCoach*, 313 U. S. 498.

The very recent case of *Guaranty Trust Co. of N. Y.* v. *York*, 13 L. W. 4564, decided by the Supreme Court June 18, 1945, after the argument in the pending case, has come to our attention. It holds specifically that an action which would be barred by a State statute of limitations, if brought in a State court, would also be barred if brought in a Federal court in equity in the same State under the provisions of the Federal statutes relating to diversity of citizenship. The burden of the decision, which follows the principle of *Erie Railway Co.* v. *Tompkins*, 304 U. S. 202, is that "since a Federal court adjudicating a State created right solely because of the diversity of citizenship of the parties is for that purpose in effect only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State". It will be noticed that the cause of action there under consideration arose under the law of the State in which the action was brought whereas in the pending case the cause of action [fols. 37-38] was based upon a contract executed under the

law of another State. We think, moreover, that the decision does not affect the rule that a State statute cannot restrict the jurisdiction of the Federal courts based on diversity of citizenship, and that the decision does not relate to the questions, discussed in the cases last cited, as to how far the public policy of a State may modify its obligations under the full faith and credit clause of the Federal Constitution or the due process clause of the Fourteenth Amendment.

The judgment of the District Court is Affirmed.

[fol. 39] JUDGMENT—Filed and entered July 19, 1945

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5310

DR. FURMAN ANGEL, Appellant,

vs.

W. H. BULLINGTON, Appellee

Appeal from the District Court of the United States for the Western District of North Carolina

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of North Carolina, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

John J. Parker, Senior Circuit Judge; Morris A. Soper, U. S. Circuit Judge; Armistead M. Dobie, U. S. Circuit Judge.

On another day, to-wit, August 20, 1945, the mandate of this Court, in this cause, is issued and transmitted to the District Court of the United States for the Western District of North Carolina, at Asheville, in due form.

[fol. 40] STIPULATION

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1945

No. —

DR. FURMAN ANGEL, Petitioner,

versus

W. H. BULLINGTON, Respondent

Subject To This Court's Approval, It Is Hereby Stipulated and Agreed, by and between the attorneys for the respective parties hereto, that for the purpose of the Petition for a writ of Certiorari, the printed record may consist of the following:

1. Appendix to the Petitioner's brief in the United States Circuit Court of Appeals for the Fourth Circuit.

2. The proceedings had before the United States Circuit Court of Appeals for the Fourth Circuit.

It Is Further Stipulated and Agreed that Petitioner will cause the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit to file with the Clerk of the Supreme Court the entire transcript of the record on appeal, including exhibits, in and opinion by the Circuit Court of Appeals for the Fourth Circuit; and that, in the event that the Petition for Writ of Certiorari be granted, the printed record shall consist of the proceeding in the court below and such portions of the entire transcript of the record on appeal, including exhibits, in that court as the parties may designate.

[fol. 41] It Is Further Stipulated and Agreed that either of the parties hereto may refer in his brief to the record filed in the Supreme Court of the United States.

G. Lyle Jones, Geo. H. Ward, Attorneys for Petitioner. —— ——, R. R. Rush, Attorneys for Respondent.

Dated this 27 day of September, 1945.

[fol. 42] CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the appendix to brief for appellant, and the proceedings in the said Circuit Court of Appeals in the therein entitled cause, as the same remain upon the records and files of the said Circuit Court of Appeals, and constitute and is a true transcript of the record and proceedings in the said Circuit Court of Appeals in the said cause, made up in accordance with the stipulation of counsel for the respective parties, for use in the Supreme Court of the United States on application for a writ of certiorari.

In Testimony Whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 6th day of October, A. D., 1945.

Claude M. Dean, Clerk, U. S. Circuit Court of Appeals, Fourth Circuit. (Seal.)

[fol. 37] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 3, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

[fol. 38] SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO RECORD—Filed Dec. 31, 1945

Subject to the Court's Approval, It Is Hereby Stipulated and Agreed, by and between the attorneys for the respective parties hereto, that the record, filed on petition for certiorari, and now in printed form in the Supreme Court, shall constitute the printed record in this case for all purposes.

This 20 day of December, 1945.

G. Lyle Jones, Geo. H. Ward, Gilmer A. Jones, Richard S. Jones, Attorneys for Petitioner.

R. R. Rush, Attorney for Respondent.

This 24 day of December, 1945.

FILE COPY

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OCT 19 1945
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 540 31

DR. FURMAN ANGEL,

Petitioner,

vs.

W. H. BULLINGTON

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

G. LYLE JONES,
GEO. H. WARD,
GILMER A. JONES,
RICHARD S. JONES.
Counsel for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 540

DR. FURMAN ANGEL,

Petitioner,

vs.

W. H. BULLINGTON

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices:

Dr. Furman Angel prays for a writ of certiorari to review a judgment of United States Circuit Court of Appeals for the Fourth Circuit entered July 19, 1945, in this cause, affirming a judgment of the District Court of the United States for the Western District of North Carolina, at Asheville. The opinion of the Court of Appeals appears in 150 Fed. (2) 679.

Jurisdiction

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on July 19, 1945 (R. 34). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 28 U. S. C. A. 347.

Questions Presented

(1) Can respondent, who had taken a deed of trust to secure deferred purchase money payments, after having caused the property to be sold under the terms of the deed of trust, obtain in the Federal Court a deficiency judgment in the face of a State Statute refusing to permit deficiency judgments in all sales of real property by mortgagees or trustees under the power of sale contained in purchase money mortgage or deed of trust executed after the enactment of the statute?

(2) Having prosecuted an action to obtain a deficiency judgment in a court of competent jurisdiction in the State of North Carolina, and the State Court of last resort, upon appeal, having adjudged that the State Court by reason of the State Statute, was without jurisdiction to entertain the action, could respondent then maintain an action in the Federal Court for said purposes, or was he estopped by the judgment of the State Court?

Statutes Involved

The Appendix infra (P. 7) contains the applicable Statute, Chapter 36 Public Laws of North Carolina 1933, G. S. of North Carolina 1943, Section 45-36.

Statement of the Case

On the 4th day of March, 1940, respondent, W. H. Bullington, a citizen and resident of the State of Virginia,

entered into a written contract with petitioner, Dr. Furman Angel, a citizen and resident of the State of North Carolina, by the terms of which he contracted to sell, and petitioner contracted to purchase, certain real estate located in the County of Roanoke, State of Virginia, for the price of $11,000.00 (R. 16). This contract was consummated on the 5th day of March, 1940 (R. 17), at which time respondent executed to petitioner a warranty deed conveying title. Upon delivery of the deed $500.00 cash was paid, and petitioner executed sixteen interest bearing negotiable notes aggregating $3,100.00 (R. 17). These purchase money notes were secured by deed of trust on the property. In addition to the cash payment and deferred payments due respondent, and as a part of the purchase price, petitioner assumed an F. H. A. loan in the amount of $7,400.00 (R. 19). He defaulted in the payment of the purchase money notes and thereafter, on the 29th day of May, 1940, the trustees sold the property, respondent becoming the purchaser for the sum of $25.00, subject to the $7,400.00 deed of trust above mentioned.

Subsequent to the foreclosure proceedings respondent instituted suit against petitioner in a Superior Court of North Carolina, seeking to recover a deficiency judgment (R. 21). Petitioner filed demurrer to the complaint setting forth, among other things, that no cause of action was alleged in the complaint for that the complaint showed upon its face that respondent was attempting to obtain judgment for the balance of the purchase price of certain real estate after foreclosure of the deed of trust. The demurrer was based upon the ground that the State of North Carolina had enacted Chapter 36 of the Public Laws of 1933, G. S. of North Carolina 1943, Section 45-36 (R. 21), establishing it to be the public policy of the State that a deficiency judgment should not be granted on purchase money notes

executed and secured by mortgage or deed of trust on real property, after the property had been sold under the mortgage or deed of trust. Respondent insisted that the act impaired the obligation of his contract and divested him of his rights in the case, and for that reason was invalid and of no effect.

The trial judge overruled the demurrer and petitioner appealed to the Supreme Court of North Carolina. The appeal was heard by said Court, which is the highest court of the State, at the Fall Term, 1941. The opinion of the Court is set forth in Volume 220, North Carolina Reports, Page 18. That Court held that the State Court had no authority to try the cause, and hence respondent could not maintain his action. There was no appeal or other action taken to have the judgment of that court reviewed by this court.

The present action was instituted in the United States District Court for the Western District of North Carolina. Petitioner filed answer to respondent's complaint, denying the right of respondent to recover and specifically plead the North Carolina Statute, Chapter 36 of the Public Laws of 1933, G. S. of North Carolina 1943, Section 45-36, and the prior action in the State Court, insisting that respondent was estopped by an unappealed judgment from prosecuting this action (R. 14). The cause was heard in the District Court upon an agreed statement of facts (R. 16). That Court held that respondent could maintain the action, and entered judgment accordingly (R. 23). The Circuit Court of Appeals affirmed the lower court (R. 30).

Specification of Errors to Be Urged

The Court below erred:

1. In holding that respondent was entitled to maintain his action in the Federal District Court in the face of the

North Carolina Statute establishing it to be the public policy of the State that deficiency judgments could not be granted on purchase money notes executed and secured by mortgage or deed of trust on the property, after default and after the property had been sold under the mortgage or deed of trust.

2. In failing to hold that respondent was estopped by the North Carolina action from prosecuting this action in the Federal Court.

Reasons Relied Upon for Allowance of the Writ

The Court below erroneously decided that respondent could maintain his action for deficiency judgment on notes given for purchase money of property in Virginia after the property had been foreclosed under deed of trust without regard to the State Statute (R. 11, 20), prohibiting judgments in such cases.

The decision below is in conflict with the principle established in *Erie* v. *Thompkins*, 304 U. S. 64, 82 L. Ed. 1188, and the recent opinion of this Court in *Guaranty Trust Company* v. *Grace W. York*, decided June 18, 1945, and reported in United States Supreme Court Reports, 89 L. Ed. 1418. There it was held that a Federal Court "can not afford recovery if the right to recover is made unavailable by the State." Therefore, after it was judicially determined by the State Court that it had no jurisdiction to try the cause, the respondent could not maintain the action in the Federal Court.

The Court erred in holding that respondent is not precluded from maintaining an action in the Federal Court for the reason that it has been judicially determined by a judgment of the State Court, which has not been reversed, that he, by reason of the North Carolina Statute, could not recover in that Court (R. 31) 200 N. C. 18.

Conclusion

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

G. Lyle Jones,
Geo. H. Ward,
Gilmer A. Jones,
Richard S. Jones,
Counsel for Petitioner.

APPENDIX

Chapter 36, Public Laws of North Carolina 1933, G. S. North Carolina 1943, Section 45-36

"Deficiency Judgments Abolished Where Mortgage Represents Part of Purchase Price.—

In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust executed after February 6, 1933, or where judgment or decree is given for the foreclosure of any mortgage executed after February 6, 1933, to secure payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same: Provided, said evidence of indebtedness shows upon the face that it is for balance of purchase money for real estate; Provided, further, that when said note or notes are prepared under the direction and supervision of the seller or sellers, he, it, or they shall cause a provision to be inserted in said note disclosing that it is for purchase money of real estate; in default of which the seller or sellers shall be liable to purchaser for any loss which he might sustain by reason of the failure to insert said provision as herein set out."

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 540

DR. FURMAN ANGEL,

Petitioner,

vs.

W. H. BULLINGTON,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the District Court (R. 24) is not printed in the published reports.

The Opinion of the Circuit Court of Appeals (R. 30) is reported in 150 Federal (2) 679.

Jurisdiction

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on July 19, 1945 (R. 34). The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. 28 U. S. C. A. 347.

Questions Presented

1. Can respondent, who has taken a deed of trust to secure deferred purchase money payments, after having caused the property to be sold under the terms of the deed of trust, obtain in the Federal Court a deficiency judgment in the face of a State Statute refusing to permit deficiency judgments in all sales of real property by mortgagees or trustees under the power of sale contained in a purchase money mortgage or deed of trust executed after the enactment of the Statute?

2. Having prosecuted an action to obtain a deficiency judgment in a court of competent jurisdiction in the State of North Carolina, and the State Court of last resort upon appeal having adjudged that the State Court, by reason of the State Statute, was without jurisdiction to entertain the action, could respondent then maintain an action in the Federal Court for said purposes, or was he estopped by the judgment of the State Court?

Statute Involved

The Appendix Infra (p. 16), contains the applicable Statute, Chapter 36, Public Laws of North Carolina 1933, G. S. of North Carolina 1943, Section 45-36.

Statement of the Case

There are no controverted issues of fact in this case. The parties entered into a stipulation agreeing upon the facts (R. 16). The facts were that petitioner purchased some real estate in Roanoke County, Virginia, paying a part of the purchase price and executing purchase money notes

secured by deed of trust for the deferred payments. Only one payment was made, the initial payment. When default was made in the payment of the first note the property was foreclosed under the deed of trust, and respondent purchased it, subject to certain outstanding indebtedness, for the sum of $25.00. He prosecuted an action in the State Court in North Carolina for deficiency judgment. The State Court denied recovery on the ground that the State Statute prohibiting deficiency judgments (R. 31) took from it jurisdiction of the case, and the right to entertain the action. Respondent then instituted the present action, which was heard upon an agreed statment of facts, and recovery was allowed. The judgment of the lower court was affirmed by the Circuit Court of Appeals.

Petitioner takes the position that the Statute is not invalid for that (a) a remedy was left to respondent whereby he could have instituted suit on his notes before foreclosure; (b) that regardless of whether a remedy was left, the Act was effectual and applied to the Federal Court; and (c) since respondent had elected to institute his action first in the State Court, and a judgment by the highest Court in the State was entered, adjudging that the State Court had no jurisdiction to entertain the action, and respondent took no appeal or other appropriate action to have the judgment reviewed by this Court, that the judgment constituted res judicata and respondent was, therefore, estopped to maintain this action.

Specification of Errors to Be Urged

The Court below erred:

1. In holding that respondent was entitled to maintain his action in the Federal District Court in the face of the North Carolina Statute establishing it to be the public policy of the State that deficiency judgments could not be

granted on purchase money notes executed and secured by mortgage or deed of trust on the property, after default, and after the property had been sold under the mortgage or deed of trust.

2. In failing to hold that respondent was estopped by the North Carolina action from prosecuting this action in the Federal Court.

Argument

The State of North Carolina in 1933 enacted the Statute in question for the purpose of establishing the public policy of the State with regard to deficiency judgments.

If the Statute was valid for the purposes enacted, it was binding on both the State and Federal Courts. *Erie Railway Co.* v. *Thompkins,* 304 U. S. 63, 82 L. Ed. 1188; *Guaranty Trust Co.* v. *York,* 89 L. Ed. 1418.

On the contrary, if it was not valid, its provisions were binding on neither the State nor the Federal Courts.

If it was not valid and there was a properly constituted State Court of competent jurisdiction to hear and determine matters of the nature in question, the State could not refuse jurisdiction to the Court to try actions involving the rights of non-residents.

The law is settled by this Court that a State Court can not escape its constitutional obligations under the full faith and credit clause by the simple device of denying jurisdiction to Courts, otherwise competent. The full faith and credit clause requires the State Court, unless it is against the declared public policy of the State, to take jurisdiction of an action when its Courts have general jurisdiction of the subject matter and the parties. *Kennedy* v. *Supreme Lodge,* 252 U. S. 411, 64 L. Ed. 638; *Broderick* v. *Rosner,* 294 U. S. 629, 79 L. Ed. 1100; *McKnett* v. *St. L. & S. F. Ry. Co.,* 292 U. S. 230, 78 L. Ed. 1227.

And, the Federal District Courts, in cases which come within the statutory requirement as to diversity of citizenship, have equal jurisdiction with State Courts to try such causes.

If the act was invalid in that its effect was to impair the obligation of a contract, as respondent has at all times and in all Courts contended it was, the State Court could not refuse to try the cause, and the judgment of the highest Court of the State, as entered, was an erroneous judgment of a Court of competent jurisdiction, but one binding on all parties until reversed by this Court. *Rooker* v. *Fidelity Trust Co.*, 263 U. S. 413, 68 L. Ed. 362.

Hence, a cause of action involving the same matter between the same parties, can not be maintained in the Federal District Court so long as such State judgment is undisturbed.

The State Court adjudged that the Statute was valid in so far as it related to the State Court, and the Circuit Court of Appeals in its opinion (R. 32) held that the interpretation of the Statute by the State Court was binding on the Federal Court.

This constitutes a conclusive adjudication that the Act is binding in so far as it relates to State Courts. We think this answers the question that the action can not be maintained in the Federal Court for the reason that since it has been judicially determined by a Court of competent jurisdiction that the State Court does not have jurisdiction to try the causes, the Federal Court, under the authority of *Erie R. R.* v. *Thompkins*, and *Trust Company* v. *York*, *supra*, is likewise without authority to maintain the action.

Petitioner submits that there is another reason why the statute is not invalid. It will be noted that the statute precludes the obtaining of deficiency judgments *after foreclo-*

sure of mortgages and deeds of trust securing purchase money notes on real estate.

The Courts of North Carolina and the Federal District Court were open to respondent to proceed against petitioner on his notes before foreclosure was had. He, therefore, had a remedy left to him which he could have pursued if he had followed that course rather than foreclosed first.

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Tennessee v. *Sneed*, 96 U. S. 69, 24 L. Ed. 610; See also: *Newark Savings Institute* v. *Furman*, 33 N. J. Equity 436; *Parker Brothers* v. *Fagan*, 68 Fed. (2) 616; *Page* v. *Ford*, 65 Oregon 450, 45 L. R. A. (N. S.) 247, 131 Pacific 1013.

The Circuit Court of Appeals in its opinion (R. 30), while holding that the interpretation of the Statute, as construed by the State Court, was binding on that Court, held that respondent could maintain his action in the Federal Court, on the ground that a State Statute could not limit or take away the jurisdiction of the Federal District Court. In support of this position the Court cited four cases, namely: *Suydan* v. *Broadnax*, 14 Pet. 67, 10 L. Ed. 357; *Union Bank* v. *Vaiden*, 18 Howard 506, 15 L. Ed. 472; *Railway Co.* v. *Whettan*, 13 Wallace 270, 20 L. Ed. 571; *David Lupton Sons* v. *Automobile Club*, 225 U. S. 489, 32 Sup. Ct. 711, 56 L. Ed. 1177.

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the estate of the deceased had been represented as insolvent except in certain cases, not of the description of that on which the suit was brought. This Court held that the constitutional and legal rights of a citizen of the United States to sue in the Courts of the United States would not permit the suit of the plaintiff to be abated simply upon a judicial decision of the insolvency of the estate.

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The case of *David Lupton Sons* v. *Automobile Club*, 225 U. S. 489, 32 Sup. Ct. 711, 56 L. Ed. 1177, involved the construction of a New York Statute which carried a provision to the effect that no foreign corporation doing business in New York should maintain any action in that State upon any contract made by it *in the State* unless it had secured a certificate showing its compliance with the requirements of the Statute. The Court of Appeals of the State of New York had construed the Statute as not rendering absolutely void contracts made by non-complying corporations. This Court held that since the New York Court had construed the Statute to hold that contracts made by corporations under such circumstances were not void, but that the only penalty against corporations which violated the statutory provisions, and did business in the State without domestication, was the loss of the privilege of maintaining a suit in the State Courts, that that did not deprive the cor-

poration of the right to maintain the action in the Federal Court.

The object of the Statute was to penalize foreign corporations for doing business in the State without complying with the domestication Statute. The suit did not involve any question of the right of an outsider, who was not engaged in transacting business within the State, to come into the State and maintain an action under the full faith and credit clause of the United States Constitution, as in the instant case. There the contract was made in New York,—the misconduct of transacting business without domestication was within the State and the suit was instituted in the Federal Court in the State. Under such facts it was held that the State Court could withhold from such party the use of its courts.

Regardless, however, of the holdings of the Court in those cases, we think the question is put at rest by the recent cases of *Erie Railway* v. *Thompkins*, 304 U. S. 64, 82 L. Ed. 1188, and *Guaranty Trust Co.* v. *Grace W. York*, 89 L. Ed. 1418.

It has been judicially determined that an action can not be maintained in the State Court, and since the Federal Court, under the decisions last above referred to, is without jurisdiction when jurisdiction is taken from the State Courts, the Circuit Court of Appeals, we submit, was in error, and its judgment should be reversed.

Respectfully submitted,

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APPENDIX

Chapter 36, Public Laws of North Carolina 1933, G. S. North Carolina 1943, Section 45-36

"Deficiency Judgments Abolished Where Mortgage Represents Part of Purchase Price"

In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust executed after February 6, 1933, or where judgment or decree is given for the foreclosure of any mortgage executed after February 6, 1933, to secure payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same: Provided, said evidence of indebtedness shows upon the face that it is for balance of purchase money for real estate; Provided, further, that when said note or notes are prepared under the direction and supervision of the seller or sellers, he, it, or they shall cause a provision to be inserted in said note disclosing that it is for purchase money of real estate; in default of which the seller or sellers shall be liable to purchaser for any loss which he might sustain by reason of the failure to insert said provision as herein set out."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. [redacted] 31

DR. FURMAN ANGEL,

Petitioner,

vs.

W. H. BULLINGTON,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

G. LYLE JONES,
GEORGE H. WARD,
GILMER A. JONES,
RICHARD S. JONES,
Counsel for Petitioner.

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STATUTES

Chapter 36, Public Laws of North Carolina 1933, G. S. North Carolina, 1943, Sec. 45-36 2

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vs.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the District Court (R. 15) is not printed in the published reports.

The opinion of the Circuit Court of Appeals (R. 20) is reported in 150 Federal (2) 679.

Jurisdiction

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on July 19, 1945 (R. 24). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. 28 U. S. C. A. 347.

Questions Presented

1. Can respondent, who has taken a deed of trust to secure deferred purchase money payments, after having caused the property to be sold under the terms of the deed of trust, obtain in the Federal Court a deficiency judgment in the face of a State Statute refusing to permit deficiency judgments in all sales of real property by mortgagees or trustees under the power of sale contained in a purchase money mortgage or deed of trust executed after the enactment of the Statute?

2. Having prosecuted an action to obtain a deficiency judgment in a court of competent jurisdiction in the State of North Carolina, and the State Court of last resort upon appeal having adjudged that the State Court, by reason of the State Statute, was without jurisdiction to entertain the action, could respondent then maintain an action in the Federal Court for said purposes, or was he estopped by the judgment of the State Court?

Statute Involved

The Appendix Infra (p. 15), contains the applicable Statute, Chapter 36, Public Laws of North Carolina 1933, G. S. of North Carolina 1943, Section 45-36.

Statement of the Case

There are no controverted issues of fact in this case. The parties entered into a stipulation agreeing upon the facts (R. 10). The facts were that petitioner purchased some real

estate in Roanoke, Virginia, paying a part of the purchase price and executing purchase money notes secured by deed of trust for the deferred payments. Only one payment was made, the initial payment. When default was made in the payment of the first note the property was foreclosed under the deed of trust, and respondent purchased it, subject to certain outstanding indebtedness, for the sum of $25.00. He prosecuted an action in the State Court in North Carolina for deficiency judgment. The State Court denied recovery on the ground that the State Statute prohibiting deficiency judgments (R. 21) took from it jurisdiction of the case, and the right to entertain the action. Respondent then instituted the present action, which was heard upon an agreed statement of facts, and recovery was allowed. The judgment of the lower court was affirmed by the Circuit Court of Appeals.

Petitioner takes the position that the Statute is not invalid for that (a) a remedy was left to respondent whereby he could have instituted suit on his notes before foreclosure; (b) that regardless of whether a remedy was left, the Act was effectual and applied to the Federal Court; and (c) since respondent had elected to institute his action first in the State Court, and a judgment by the highest Court in the State was entered, adjudging that the State Court had no jurisdiction to entertain the action, and respondent took no appeal or other appropriate action to have the judgment reviewed by this Court, that the judgment constituted *res judicata* and respondent was, therefore, estopped to maintain this action.

Specification of Errors to Be Urged

The Court below erred:

1. In holding that respondent was entitled to maintain his action in the Federal District Court in the face of the North Carolina Statute establishing it to be the public

policy of the State that deficiency judgments could not be granted on purchase money notes executed and secured by mortgage or deed of trust on the property, after default, and after the property had been sold under the mortgage or deed of trust.

2. In failing to hold that respondent was estopped by the North Carolina action from prosecuting this action in the Federal Court.

Summary of Argument

I

The North Carolina Statute enacted in 1933, abolishing deficiency judgments where mortgage represents part of purchase price, is valid as coming within the police power of the State.

II

Respondent having instituted action in the State Court of North Carolina asking for the same relief as here demanded, and an unappealed adjudication having been made by the highest court of the State to the effect that the statute is valid, he is hereby precluded from maintaining this action in the Federal Court.

ARGUMENT

I

The Statute Is Valid

The State of North Carolina in 1933 enacted the Statute in question for the purpose of establishing the public policy of the State with regard to deficiency judgments.

Respondent takes the position that this statute is invalid as being repugnant to the Contract Clause of the Constitu-

tion of the United States, Article 1, Section 10. Petitioner insists that it is valid as coming within the police powers of the State.

It was universally known at the time of the enactment of the statute in question that there was a nation-wide business and financial crisis. The Courts will take judicial notice of such fact.

Atcheson T. & S. F. R. Co. v. *United States*, 284 U. S. 248; 76 L. Ed. 273.

In the case of *Home Building and Loan Association* v. *Blaisdell*, 189 Minn. 422; 249 N. W. 334, 86 A. L. R. 1507, involving the validity of a Mortgage Moratorium Statute, which we submit is the same in principle as the question here involved, the Court said:

> "In addition to the weight to be given the determination of the legislature that an economic emergency exists which demands relief, the Court must take notice of other considerations. The members of the legislature come from every community of the State and from all walks of life. They are familiar with conditions generally in every calling, occupation, profession and business in the state. Not only they, but the courts must be guided by what is common knowledge. It is common knowledge that in the last few years land values have shrunk enormously. Loans made a few years ago upon the basis of the then going values cannot possibly be replaced on the basis of present values. We all know that when this law was enacted the large financial companies, which had made it their business to invest in mortgages, had ceased to do so. No bank would directly or indirectly loan on real estate mortgages. Life insurance companies, large investors in such mortgages, had even declared a moratorium as to the loan provisions of their policy contracts. The President had closed banks temporarily. The Congress, in addition to many extraordinary measures looking to

the relief of the economic emergency, had passed an act to supply funds whereby mortgagors may be able within a reasonable time to refinance their mortgages or redeem from sales where the redemption has not expired. With this knowledge the court cannot well hold that the legislature had no basis in fact for the conclusion that an economic emergency existed which called for the exercise of the police power to grant relief."

Another Justice of the same Court, in a concurring opinion, added the following:

"The present nation wide and world wide business and financial crisis has the same results as if it were caused by flood, earthquake, or disturbance in nature. It has deprived millions of persons in this nation of their employment and means of earning a living for themselves and their families; it has destroyed the value of and the income from all property on which thousands of people depended for a living; it actually has resulted in the loss of their homes by a number of our people and threatens to result in the loss of their homes by many other people in this state; it has resulted in such widespread want and suffering among our people that private, state and municipal agencies are unable to adequately relieve the want and suffering and congress has found it necessary to step in and attempt to remedy the situation by federal aid. Millions of the people's money were and are yet tied up in closed banks and in business enterprises.

That Court upheld the statute in question and the case was appealed to this Court where the judgment was affirmed in a most exhaustive opinion written by Mr. Chief Justice Hughes.

Home Building & Loan Association v. *Blaisdell*, 290 U. S. 398; 78 L. Ed. 413; 88 A. L. R. 1481.

With the citizens of the State burdened down under such a business and financial crisis the legislature of the State of

North Carolina felt compelled to adopt the public policy reflected in the statute in question. Without the adoption of such a course the citizens of the State would have been plunged deeper into chaos.

In the *Blaisdell* case, *supra*, this Court said:

> "Not only is the constitutional provision qualified by the measure of control which the State retains over remedial processes, but the State also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect.' Stephenson v. Binford, 287 U. S. 251, 276, 77 L. Ed. 288, 301, 53 S. Ct. 181, 87 A. L. R. 721. Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractural relations are worth while—a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court. • • •
>
> But into all contracts, whether made between States and individuals, or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the pre-existing and higher authority of the laws of nature, of nations or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions

inherent and paramount, wherever a necessity for their execution shall occur. • • •

The question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends. • • •"

In the recent case of *East New York Savings Bank* v. *Hahn*, Supreme Court Law Edition Advance Opinions Vol. 90, Page 9, which involved the validity of a New York Statute enacted in 1943, carrying forward a Moratorium Statute originally enacted in 1933, this Court held that statute was valid, and after reviewing the comprehensive opinion of Mr. Chief Justice Hughes in the *Blaisdell* case, *supra*, said:

"The formal mode of reasoning by means of which this 'protective power of the State', 290 U. S. at 440, 78 L. Ed. 430, S. Ct. 231, 88 A. L. R. 1481, is acknowledged is of little moment. It may be treated as an implied condition of every contract and, as such, as much part of the contract as though it were written into it, whereby the State's exercise of its power enforces, and does not impair a contract. A more candid statement is to recognize, as was said in Manigault v. Springs, supra, that the power 'which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the • • • general welfare of the people, and is paramount to any rights under contracts between individuals.' 199 U. S. at 480, 50 L. Ed. 278, 26 S. Ct. 127. Once we are in this domain of the reserve power of a State we must respect the 'wide discretion on the part of the legislature in determining what is and what is not necessary.' Ibid. So far as the constitutional issue is concerned, 'the power of the State when otherwise justified,' Marcus Brown Holding Co. v. Feldman, 256 U. S. 170, 198, 65 L. Ed. 877, 888, 41 S. Ct. 465, is not diminished because a private contract may be affected".

From the foregoing petitioner submits that the statute is valid as coming within the police power of the State, being a proper question for adoption as the public policy of the State, by its legislature.

II

There Being a Final Adjudication in the Highest Court of the State as to the Validity of the Statute, Respondent Cannot Again Prosecute the Same Action in the Federal Court.

If the Statute was valid for the purposes enacted, it was binding on both the State and Federal Courts. *Erie Railway Co.* v. *Tompkins*, 304 U. S. 63, 82 L. Ed. 1188; *Guaranty Trust Co.* v. *York*, 89 L. Ed. 1418.

On the contrary, if it was not valid, its provisions were binding on neither the State nor the Federal Courts.

If it was not valid and there was a properly constituted State Court of competent jurisdiction to hear and determine matters of the nature in question, the State could not refuse jurisdiction to the Court to try actions involving the rights of non-residents.

The law is settled by this Court that a State Court can not escape its constitutional obligations under the full faith and credit clause by the simple device of denying jurisdiction to Courts, otherwise competent. The full faith and credit clause requires the State Court, unless it is against the declared public policy of the State, to take jurisdiction of an action when its Courts have general jurisdiction of the subject matter and the parties. *Kennedy* v. *Supreme Lodge*, 252 U. S. 411, 64 L. Ed. 638; *Broderick* v. *Rosner*, 294 U. S. 629, 79 L. Ed. 1100; *McKnett* v. *St. L. & S. F. Ry. Co.*, 292 U. S. 230, 78 L. Ed. 1227.

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If the act was invalid in that its effect was to impair the obligation of a contract, as respondent has at all times and in all Courts contended it was, the State Court could not refuse to try the cause, and the judgment of the highest Court of the State, as entered, was an erroneous judgment of a Court of competent jurisdiction, but one binding on all parties until reversed by this Court. *Rooker* v. *Fidelity Trust Co.*, 263 U. S. 413, 68 L. Ed. 362.

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The Courts of North Carolina and the Federal District Court were open to respondent to proceed against petitioner on his notes before foreclosure was had. He, therefore, had a remedy left to him which he could have pursued if he had followed that course rather than foreclosed first.

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or sustained against any executor or administrator after the estate of the deceased had been represented as insolvent except in certain cases, not of the description of that on which the suit was brought. This Court held that the constitutional and legal rights of a citizen of the United States to sue in the Courts of the United States would not permit the suit of the plaintiff to be abated simply upon a judicial decision of the insolvency of the estate.

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Regardless, however, of the holdings of the Court in those cases, we think the question is put at rest by the recent cases of *Erie Railway* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, and *Guaranty Trust Co.* v. *Grace W. York*, 89 L. Ed. 1418.

If the judgment of the Circuit Court of Appeals be upheld, it would mean:

(a) A citizen of North Carolina does not have the same right as a non-resident citizen.

(b) A non-resident whose claim amounts to less than $3,000.00 is deprived of any right and is placed in the same position as a resident of this State.

(c) Only a non-resident who has a claim in excess of $3,000.00 would have any right in Court.

This would be counter to what is said in the case of *Guaranty Trust Company* v. *Grace W. York, supra*, to wit:

"The operation of a double system of conflicting laws in the same State is plainly hostile to the reign of law.

> Certainly the fortuitous circumstance of residence out of the State of one of the parties to a litigation ought not to give rise to a discrimination against others equally concerned but locally resident".

It has been judicially determined that an action can not be maintained in the State Court, and since the Federal Court, under the decisions last above referred to, is without jurisdiction when jurisdiction is taken from the State Courts, the Circuit Court of Appeals, we submit, was in error and its judgment should be reversed.

Conclusion

The judgment below should be reversed.

Respectfully submitted,

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Counsel for Petitioner.

APPENDIX

Chapter 36, Public Laws of North Carolina 1933, G. S. North Carolina 1943, Section 45-36

"DEFICIENCY JUDGMENTS ABOLISHED WHERE MORTGAGE REPRESENTS PART OF PURCHASE PRICE

In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust executed after February 6, 1933, or where judgment or decree is given for the foreclosure of any mortgage executed after February 6, 1933, to secure payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same: Provided, further, that when said note or notes are prepared under the direction and supervision of the seller or sellers, he, it, or they shall cause a provision to be inserted in said note disclosing that it is for purchase money of real estate; in default of which the seller or sellers shall be liable to purchaser for any loss which he might sustain by reason of the failure to insert said provision as herein set out."

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No. 31

Supreme Court of the United States

OCTOBER TERM, 1945

DR. FURMAN ANGEL, *Petitioner*

v.

W. H. BULLINGTON, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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No. 540

Supreme Court of the United States

OCTOBER TERM, 1945

DR. FURMAN ANGEL, *Petitioner*

v.

W. H. BULLINGTON, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the District Court (R. 24) is not printed in the published reports.

The opinion of the Circuit Court of Appeals (R. 30) is reported in 150 F.2d 679.

JURISDICTION

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on July 19, 1945 (R. 34). The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C.A. 347).

QUESTION PRESENTED

Can the State of North Carolina, by act of its legislature, prevent recovery on notes payable in Virginia, secured by purchase money deed of trust, on Virginia real estate after purchase of the real estate by the holder of the notes at a foreclosure sale?

STATEMENT OF THE CASE

The facts stated in petitioner's brief are admittedly correct. It should be added, however, that petitioner took possession of and occupied the real estate purchased from respondent; and that the notes upon which this action was brought were payable in Virginia (R. 17, 20).

SUMMARY OF ARGUMENT

1. The North Carolina act relied upon by the petitioner, and contained in the appendix of his brief, is clearly in conflict with the contract clause of the Federal Constitution.

2. The judgment of the North Carolina State

Court cannot be set up as a bar to the action brought in the Federal Court for the reason that the North Carolina judgment was not a decision on the merits of the case.

ARGUMENT

I.

THE CONTRACT CLAUSE OF THE CONSTITUTION

The several states are prohibited from passing any law impairing the obligation of contracts (Constitution of the United States, Article I, Section 10). The obligation of the contract is the law in effect at the time and place of the making and where it is to be performed (*Von Hoffman* v. *City of Quincy*, 4 Wall. 535, 538).

Petitioner in effect admits that the North Carolina act impairs the obligation of the contract between petitioner and respondent, but contends that the reserve power of the state is superior to the Constitution of the United States. He relies upon *Home Bldg. & L. Assn.* v. *Blaisdell*, 290 U.S. 398, and *East New York Savings Bank* v. *Hahn*, _____ U.S. _____, 90 L.Ed. 9.

The Minnesota and New York Mortgage Moratorium Acts, considered in the last cited cases, declared an economic emergency, were temporary in their operation and limited to the emergency. Later cases decided by this Court have limited, rather than extended, their effect.

In *W. B. Worthen Co.* v. *Thomas*, 292 U.S. 426, this Court in discussing the holding in the *Blaisdell* case, *supra*, said (pp. 433-434):

> But we also held that this essential reserved power of the State must be construed in harmony with the fair intent of the constitutional limitation, and that this principle precluded a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them. We held that when the exercise of the reserved power of the State, in order to meet public need because of a pressing public disaster, relates to the enforcement of existing contracts, that action must be limited by reasonable conditions appropriate to the emergency.
>
> * * * *
>
> In the instant case, the relief sought to be afforded is neither temporary nor conditional. In placing insurance money beyond the reach of existing creditors, the Act contains no limitations as to time, amount, circumstances, or need.

In *Worthen Co.* v. *Kavanaugh*, 295 U.S. 56, the Arkansas act there considered like the North Carolina act showed (p. 60) "studied indifference to the interests of the mortgagee or to his appropriate protection".

II.

THE JUDGMENT OF THE NORTH CAROLINA STATE COURT IS NOT A BAR TO THE INSTANT ACTION

The doctrine of *res judicata* has no application in this case. The judgment of the North Carolina State Court was not a decision on the merits but a dismissal for want of jurisdiction. The Supreme Court of North Carolina in its opinion (*Bullington* v. *Angel*, 220 N.C. 18, 16 S.E.2d 411) said (p. 412):

> It will be noted that the limitation created by the statute is upon the jurisdiction of the Court. * * *The statute operates upon the adjective law of the state which pertains to the practice and procedure, or legal machinery by which the substantive law is made effective and not upon the substantive law itself.
>
> * * * *
>
> Both the constitutional provision urged and the general doctrine invoked by the appellee are substantive law and the statute involved, as aforesaid, relates solely to the adjective law. No denial of the full force and credit of the Virginia contract is made, and no interpretation of construction of the contract involved is attempted. The court being deprived of its jurisdiction, has no power to render a judgment for the plaintiff in the cause of action alleged. "Jurisdiction is power

> to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the case."

The judgment of a court of competent jurisdiction on the merits is the prime essential for the application of *res judicata* (*Hughes* v. *United States*, 4 Wall. 232; *Smith* v. *McNeal*, 109 U.S. 426).

In the opinion of this Court, *In Re Labor Board*, 304 U.S. 486, it was said (p. 494):

> Jurisdiction * * * is the power to hear and determine the controversy presented, in a given set of circumstances. A court has jurisdiction, in another use of the term, to examine the question whether that power is conferred upon it in the circumstances disclosed, but if it finds such power is not granted it lacks jurisdiction of the subject matter and must refrain from any adjudication of rights in connection therewith.

Petitioner seeks to avoid the universal principle of law that a state may not deprive the Federal Courts of jurisdiction by legislative enactment by attempting to apply the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64. It is submitted that the *Erie* case, *supra*, has no application to the question here involved for the reason that (p. 78) "matters governed by the Federal Constitution" were expressly excepted from the application of state law. See also Federal Judiciary Act

of September 24, 1789, c. 20 (28 U.S.C. 725); *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487, 496; and *Griffin* v. *McCoach*, 313 U.S. 498, 507.

In *Irving Trust Co.* v. *Day*, 314 U.S. 556, it is said (p. 561):

> When this Court is asked to invalidate a state statute upon the ground that it impairs the obligation of a contract; the existence of the contract and the nature and extent of its obligation become federal questions for the purposes of determining whether they are within the scope and meaning of the Federal Constitution, and for such purposes finality cannot be accorded to the views of a state court.

To the petitioner's contention that an adequate remedy was left to the respondent since he could have instituted action prior to foreclosure, it is sufficient to state that at the time respondent's action was instituted there was in existence a valid cause of action. Petitioner's contention of the construction of the North Carolina act would deprive respondent of his rights then existing.

CONCLUSION

The judgment of the District Court for the Western District of North Carolina should not be disturbed. To hold otherwise would deprive respondent of rights guaranteed to him by the Constitution of the United States.

Respectfully submitted,

JOHN L. WALKER,

R. ROY RUSH,

Counsel for Respondent

JANUARY, 1946

Reed J. p. 8
Rutledge J. pp. 1, 2, 6, 10

SUPREME COURT OF THE UNITED STATES.

No. 31.—October Term, 1946.

Dr. Furman Angel, Petitioner, v. W. H. Bullington.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[February 17, 1947.]

Mr. Justice Frankfurter delivered the opinion of the Court.

In 1940, Bullington, a citizen of Virginia, sold land in Virginia to Angel, a citizen of North Carolina. Only part of the purchase price was paid. For the balance, Angel executed a series of notes secured by a deed of trust on the land. Upon default on one of the notes, Bullington, acting upon an acceleration clause in the deed, caused all other notes to become due and called upon the trustees to sell the land. The sale was duly made in Virginia and the proceeds of the sale applied to the payment of the notes. This controversy concerns attempts to collect the deficiency.

Bullington began suit for the deficiency in the Superior Court of Macon County, North Carolina. Angel countered with a demurrer, the substance of which was that a statute of North Carolina (c. 36, Public Laws 1933, Mitchie's Code § 2593 (f)) precluded recovery of such a deficiency judgment. This is the relevant portion of that enactment:

> "In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust hereafter executed, . . . the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same: . . ."

The Superior Court overruled the demurrer, and an appeal to the Supreme Court of North Carolina followed. Bull-

ington supported his Superior Court judgment on the ground that the United States Constitution precluded North Carolina from shutting the doors of its courts to him. The North Carolina Supreme Court, holding that the North Carolina Act of 1933 barred Bullington's suit against Angel, reversed the Superior Court and dismissed the action. 220 N. C. 18. Bullington did not seek to review this judgment here. Instead, he sued Angel for the deficiency in the United States District Court for the Western District of North Carolina. Angel pleaded in bar the judgment in the North Carolina action. The District Court gave judgment for Bullington and the Circuit Court of Appeals for the Fourth Circuit affirmed. 150 F. (2d) 679. We granted certiorari, 326 U. S. 713, because the failure to dismiss this action, on the ground that the judgment in the North Carolina court precluded the right thereafter to recover on the same cause of action in the federal court, presented an important question in the administration of justice.

1. We start with the fact that the prevailing rule as to *res judicata* is settled law in North Carolina. An adjudication bars future litigation between the same parties not only as to all issues actually raised and decided but also as to those which could have been raised. *Southern Distributing Co.* v. *Carraway*, 196 N. C. 58, 60–61; *Moore* v. *Harkins*, 179 N. C. 167. When the disposition of a prior litigation is invoked as a bar to an action, the identity of the causes of action in the two suits is usually the bone of contention. On this score there can here be no controversy. It is indisputable that the parties, the nature of the claim and the desired relief were precisely the same in the two actions successively brought by Bullington against Angel, first in the Superior Court of Macon County and then in the federal district court. For all practical purposes, the complaint in the present action was a carbon copy of the complaint in the State court action. If the North Caro-

lina action had been dismissed because it was brought in one North Carolina court rather than in another, of course no federal issue would have been involved. See, *e. g.*, *Woods* v. *Nierstheimer*, 328 U. S. 211. Had that been the case, a suit for the same cause of action could have been initiated in a North Carolina federal district court, just as another suit could have been brought in the proper North Carolina State court. But that is not the present situation. A quite different situation is before us. Being somewhat unusual, it calls for a critical consideration of the scope and purpose of the doctrine of *res judicata*.

2. The judgment of the Supreme Court of North Carolina would clearly bar this suit had it been brought anew in a state court. For purposes of diversity jurisdiction a federal court is "in effect, only another court of the State". *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 108; see *Traction Company* v. *Mining Company*, 196 U. S. 239, 253; *Ex parte Schollenberger*, 96 U. S. 369, 377. Of course, Bullington could not have succeeded in the District Court for the Western District of North Carolina after an adverse judgment in the State courts, had the decision in this case involved no federal ground. That is equally true where a federal question was decided in the State courts. That the adjudication of federal questions by the North Carolina Supreme Court may have been erroneous is immaterial for purposes of *res judicata*. *Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316, 325. A higher court was available for an authoritative adjudication of the federal questions involved. And so the question is whether federal rights were necessarily involved and adjudicated in the litigation in the State courts.

3. For purposes of *res judicata*, the significance of what a court says it decides is controlled by the issues that were open for decision. What were the issues in the North Carolina litigation? Bullington sought a deficiency judg-

ment. Angel, by demurrer, resisted on the ground that a North Carolina statute precluded a deficiency judgment. The North Carolina Supreme Court, reversing the trial court, found the North Carolina statute a bar to such a suit. It said that

> "the limitation created by the statute is upon the jurisdiction of the court in that it is declared that the holder of notes given to secure the purchase price of real property 'shall not be entitled to a deficiency judgment on account' thereof. This closes the courts of this State to one who seeks a deficiency judgment on a note given for the purchase price of real property. The statute operates upon the adjective law of the State, which pertains to the practice and procedure, or legal machinery by which the substantive law is made effective, and not upon the substantive law itself. It is a limitation of the jurisdiction of the courts of this State." 220 N. C. 18; 20.

But the allowable "limitation of the jurisdiction of the Courts" of North Carolina presents more than a question of local law for determination by the North Carolina Supreme Court. Speaking for a unanimous Court, Mr. Justice Brandeis thus expressed the subordination to the requirements of the Constitution of the power of a State to withdraw jurisdiction from its courts: "The power of a State to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them is, of course, subject to the restrictions imposed by the Federal Constitution." *McKnett* v. *St. Louis & S. F. Ry. Co.*, 292 U. S. 230, 233. The Contract Clause, the Full Faith and Credit Clause, the Privileges or Immunities Clause, all fetter the freedom of a State to deny access to its courts howsoever much it may regard such withdrawal of jurisdiction "the adjective law of the State", or the exercise of its right to regulate "the practice and procedure" of its courts. *Broderick* v. *Rosner*, 294 U. S. 629, 642. A State "cannot escape its constitutional obligations by the simple device of denying juris-

diction in such cases to courts otherwise competent." *Kenney* v. *Supreme Lodge*, 252 U. S. 411, 415; and see *White* v. *Hart*, 13 Wall. 646. This pervasive principle of our federal law, constitutional and statutory, was thus put by Mr. Justice Holmes: "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis* v. *Wechsler*, 263 U. S. 22, 24.

4. Here, claims based on the United States Constitution were plainly and reasonably made in the North Carolina suit. The North Carolina Supreme Court met these claims. It met them by saying that the North Carolina statute did not deal with substantive matters but merely with matters regulating local procedure. But whether the claims are based on a federal right or are merely of local concern is itself a federal question on which this Court, and not the Supreme Court of North Carolina, has the last say. That Court could not put a federal claim aside, as though it were not in litigation, by the talismanic word "jurisdiction". When an asserted federal right is denied, the sufficiency of the grounds of denial is for this Court to decide. *Titus* v. *Wallick*, 306 U. S. 282, 291. Bullington could have come here, not merely by the grace of this Court on certiorari, but on appeal, as did White in *White* v. *Hart*, *supra*, to challenge, successfully, the right of Georgia to limit the jurisdiction of the Georgia courts; as did the East New York Savings Bank in the recent case of *East New York Bank* v. *Hahn*, 326 U. S. 230, to challenge, though unsuccessfully, the limitation which New York placed upon the jurisdiction of its courts. Cf. *Kenney v. Supreme Lodge*, 252 U. S. 411, 416. Since it was open for Bullington to come here to seek reversal of the decision of the North Carolina Supreme Court shutting him out of the North Carolina courts and he chose not to do so, the decision of the North Carolina

Supreme Court concluded an adjudication of a federal question even though it was not couched in those terms. For purposes of litigating the issues in controversy in the North Carolina action, the North Carolina Supreme Court was an intermediate tribunal. If a litigant chooses not to continue to assert his rights after an intermediate tribunal has decided against him, he has concluded his litigation as effectively as though he had proceeded through the highest tribunal available to him. An adjudication of an issue implies that a man had a chance to win his case. The chance was necessarily afforded by the North Carolina litigation. It was in process of determination when the Supreme Court of North Carolina decided it against him. He forewent his right to have a higher court, this Court, enable him to win his chance by holding that he was right and that the North Carolina Supreme Court was wrong. He cannot begin all over again in an action involving the same issues before another forum in the same State.

5. It is suggested that the North Carolina Supreme Court did not adjudicate the "merits" of the controversy. It is a misconception of *res judicata* to assume that the doctrine does not come into operation if a court has not passed on the "merits" in the sense of the ultimate substantive issues of a litigation. An adjudication declining to reach such ultimate substantive issues may bar a second attempt to reach them in another court of the State. Such a situation is presented when the first decision is based not on the ground that the distribution of judicial power among the various courts of the State requires the suit to be brought in another court in the State, but on the inaccessibility of all the courts of the State to such litigation. And that is the essence of the present case. The only issue in controversy in the first North Carolina litigation was whether or not all the courts of North Carolina were closed to that litigation. The merits of that

issue were adjudicated. And that was the issue raised in the second litigation in North Carolina—that in the federal district court. The merits of this issue having been adjudicated, they cannot be relitigated.

The "merits" of a claim are disposed of when they are refused enforcement. If an asserted federal claim is denied enforcement on a professed local ground, but a so-called local ground which is subject to review here because it is in fact the adjudication of a federal question, then the "merits" of that claim were adjudicated in the only sense that adjudication of the "merits" is relevant to the principles of *res judicata*. A State court cannot sterilize federal claims by putting on the adjudication a local label.

6. The merits of this controversy were adjudicated by the North Carolina Supreme Court since that court, or this Court on appeal, might have decided that the North Carolina statute did not bar Bullington's first action. The North Carolina statute might have been found unconstitutional. Federal issues were thus involved in the adjudication by the North Carolina Supreme Court. Bullington knew that there were federal issues in the State suit because he raised them. He was then content to drop them and let the intermediate adjudication stand. Now he wants an encore.

7. It is suggested that the North Carolina Supreme Court construed the North Carolina statute to close only the North Carolina State courts but not the federal court sitting in North Carolina. In the first place, the North Carolina Supreme Court said no such thing. It construed the statute expressive of State policy and spoke only of the jurisdiction of the State courts because it was concerned only with the State courts. Secondly, it is most incongruous to attribute to the legislature and judiciary of North Carolina the imposition of a restriction against all its citizens from suing for a deficiency judgment, while

impliedly authorizing citizens of other States to secure such deficiency judgments against North Carolinians. Thirdly, a North Carolina statute, upheld by the highest court of North Carolina, is of course expressive of North Carolina policy. The essence of diversity jurisdiction is that a federal court enforces State law and State policy. If North Carolina has authoritatively announced that deficiency judgments cannot be secured within its borders, it contradicts the presuppositions of diversity jurisdiction for a federal court in that State to give such a deficiency judgment. North Carolina would hardly allow defeat of a State-wide policy through occasional suits in a federal court. What is more important, diversity jurisdiction must follow State law and policy. A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld. Availability of diversity jurisdiction which was put into the Constitution so as to prevent discrimination against outsiders is not to effect discrimination against the great body of local citizens.

Cases like *David Lupton's Sons* v. *Auto Club of Am.*, 225 U. S. 489, are obsolete insofar as they are based on a view of diversity jurisdiction which came to an end with *Erie Railroad* v. *Tompkins*, 304 U. S. 64. That decision drastically limited the power of federal district courts to entertain suits in diversity cases that could not be brought in the respective State courts or were barred by defenses controlling in the State courts. Compare *Suydam* v. *Broadnax*, 14 Peters 67, 75. Of course, where resort is had to a federal court not on grounds of diversity of citizenship but because a federal right is claimed, the limitations upon the courts of a State do not control a federal court sitting in the State. *Holmberg* v. *Armbrecht*, 327 U. S. 392.

8. After an adverse decision against Bullington on a cause of action created by State law, Bullington wants to start all over again in another North Carolina court, albeit

a federal court. The first litigation raised and adjudicated federal issues every one of which is again involved in the second suit. To allow such a second suit is to say that a federal right in issue in a State court evaporates because the State court calls it a State right and the litigant accepts the decision. If tolerated, our federal system would afford fine opportunities for needlessly multiplying litigation in this way. The doctrine of *res judicata* is a barrier against it. Litigation is the means for vindicating rights, but it may also involve unwarranted friction and waste. The doctrine of *res judicata* reflects the refusal of law to tolerate needless litigation. Litigation is needless if, by fair process, a controversy has once gone through the courts to conclusion. Compare, *e. g.*, *Hazel Atlas Co.* v. *Hartford Co.*, 322 U. S. 238, 244. And it has gone through, if issues that were or could have been dealt with in an earlier litigation are raised anew between the same parties. *Chicot County Dist.* v. *Bank*, 308 U. S. 371.

Judgment reversed.

SUPREME COURT OF THE UNITED STATES

No. 31.—October Term, 1946.

Dr. Furman Angel, Petitioner, v. W. H. Bullington.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[February 17, 1947.]

Mr. Justice Reed, dissenting.

My understanding of the Court's decision is that the doctrine of *res judicata*, that is a former adjudication, defeats Bullington's claim against Angel. The opinion is limited to that point. In my view the conclusion reached by the Court is erroneous. To narrow the line of my disagreement, I shall state the issues treated in the opinion with which I agree. The causes of action and the parties in the two suits are identical. Federal questions were raised by Bullington's contention that the North Carolina statute sufficiently quoted at the beginning of the Court's opinion, Mitchie's Code, 2593 (f), was unconstitutional by federal tests because it barred the North Carolina courts to Bullington's suit on his notes. It is immaterial, for the purposes of determining the availability of a plea of *res judicata*, whether the North Carolina judgment was erroneous or not. I agree, further, that, on the ground that a state cannot bar this cause of action from its courts, Bullington could have had review in this Court of the North Carolina judgment and that this Court, if it did not conclude that the North Carolina judgment rested on an adequate state ground, could have finally settled that federal constitutional issue.

The reasoning of the Court leads to the announced result because of these presuppositions with which I differ: (I) "For purposes of *res judicata* the significance of what a court says it decides is controlled by the issues that were open for decision." (II) "The 'merits' of a claim

are disposed of when they are refused enforcement." (III) "Since it was open for Bullington to come here to seek reversal of the decision of the North Carolina Supreme Court shutting him out of the North Carolina courts and he chose not to do so, the decision of the North Carolina Supreme Court concluded an adjudication of a federal question even though it was not couched in those terms." (IV) "For purposes of diversity jurisdiction a federal court is 'in effect, only another court of the State.' " "He cannot begin all over again in an action involving the same issues before another forum in the same State."

I. To say that for purposes of *res judicata* the significance of what a court says it decides is controlled by the issues, announces a rule which, so far as I know, has no prior authority. To adopt such a rule is to declare that a decision in a cause of action is final between the same parties although the court specifically reserves certain questions not necessary for its decision. *Res judicata* settles all questions which were raised or those that might have been raised but it settles them in accordance with the decision that is made. Of course, when a decision is upon the merits, a matter discussed later, the entire cause of action is adjudicated finally. But this North Carolina adjudication was not upon the merits. It was upon a question of judicial power. The pertinent excerpts from the opinion appear below.[1] The fact that other issues, going to the merits of the cause of action, might have been decided seems immaterial.

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[1] 220 N. C. at 20–21: "The statute operates upon the adjective law of the State, which pertains to the practice and procedure, or legal machinery by which the substantive law is made effective and not upon the substantive law itself. It is a limitation of the jurisdiction of the courts of this State.

"The Legislature, within constitutional limitations, can fix and circumscribe the jurisdiction of the courts of this State. The Legislature has exercised its prerogative to so limit the jurisdiction of the

The rule which I consider sound appears in the Restatement of the Law, Judgments § 49, as follows:

> "Where a valid and final personal judgment not on the merits is rendered in favor of the defendant, the plaintiff is not thereby precluded from thereafter maintaining an action on the original cause of action and the judgment is conclusive only as to what is actually decided."

The way to know what was actually decided in this case is to read the applicable portion of the opinion printed in the preceding note. The result of the decision was to leave the cause of action unaffected because when a state denies a remedy, it leaves "unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere." *Bradford Electric Co.* v. *Clapper*, 286 U. S. 145, 160; *Dalton* v. *Webster*, 82 N. C. 279.

II. It is now to be considered whether or not this judgment of the state court was on the merits. That court said it had no "power to render a judgment for the plaintiff in the cause of action alleged." This Court now says that such a decision is a disposition on the merits. Evidently what is meant is that when a litigant, who has raised

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courts of this State that holders of notes given for purchase price of real estate are not entitled to a deficiency judgment thereon in such courts. We cannot hold that this action upon part of the legislative branch of our government impinged the full faith and credit clause of the Constitution of the United States or the general doctrine that the validity of a contract is determined by the law of the place where made, the *lex loci contractus* as distinguished from the *lex fori*. Both the constitutional provision urged and the general doctrine invoked by the appellee are substantive law and the statute involved, as aforesaid, relates solely to the adjective law. No denial of the full force and credit of the Virginia contract is made, and no interpretation or construction of the contract involved is attempted. The court, being deprived of its jurisdiction, has no power to render a judgment for the plaintiff in the cause of action alleged. 'Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle.'"

a federal constitutional question, has his case dismissed on the ground that the court "has no power to render a judgment for the plaintiff in the cause of action alleged," there is a judgment on the merits on the constitutional question as well as upon the right to recover in North Carolina on any other ground. If we have power to declare that it "concluded an adjudication of a federal question even though it professed not to do so," I would reach the opposite conclusion based upon what the North Carolina court did. In my view, the North Carolina court merely decided that it had no power to adjudicate the cause of action. Certainly the state court had the power to interpret its own statute. *Knights of Pythias* v. *Meyer*, 265 U. S. 30, 32; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568. The withdrawal of jurisdiction surely does not make a judgment one upon the merits. The state court cited *Ex parte McCardle*, 7 Wall. 506, to emphasize what it meant. If there was a suit on this note in a federal court on an allegation of diversity of citizenship and the federal court dismissed the suit with an opinion saying that the case was dismissed because of lack of jurisdiction, *e. g.* proof of non-diversity of citizenship, no state court would hold that there had been a decision upon the merits. Where there is no jurisdiction of the subject of the action the judgment is not upon the merits. *Stoll* v. *Gottlieb*, 305 U. S. 165, 171–172. Of course, if there is a judgment upon the merits, that judgment would be binding on both federal and state courts. Even if the North Carolina decision is not upon the merits, it is conclusive on North Carolina courts and upon federal courts in North Carolina, if those federal courts are courts of the State of North Carolina in the sense that they must follow state decisions upon the power of state courts, under the rule of *Guaranty Trust Co.* v. *York*, 326 U. S. 99. I do not think that the *Guaranty* rule applies. See subdivision IV.

III. If the two preceding numbered divisions of this opinion are sound, there was no occasion for Bullington

to seek a review of the first judgment in this Court. He was in the position of the owner of a cause of action, dismissed because prematurely brought or brought in the wrong county. The judgment that the Supreme Court of North Carolina ordered was "dismissed", not on the merits, not with prejudice, and not judgment for the defendant, but a simple dismissal. North Carolina might have declared, by statute, that no cause of action would be recognized in North Carolina for the recovery of a deficiency on a mortgage indebtedness. Instead of this, we are told, authoritatively, by the Supreme Court of North Carolina that North Carolina has withdrawn the jurisdiction of its courts from such a cause of action. This produces quite a different situation.

IV. The pith of the problem, as I see it, is laid bare by the foregoing differentiations. It consists of the question whether the North Carolina decision establishes a controlling rule of law upon the constitutionality of the state statute as tested by the federal Constitution or adjudicates that the statute merely withdraws jurisdiction from state courts over a type of action. This Court concludes that the state decision determined the constitutionality of the statute and that its holding was binding on all federal courts in North Carolina, as well as state courts. This idea is comprehended in the Court's opinion by the statements that the federal courts are courts of the state in diversity cases and that a litigant cannot stop with an intermediate court decision against him and begin a new litigation on the same cause of action.

The Court reaches the conclusion that *res judicata* should apply by an application of *Erie Railroad* v. *Tompkins*, 304 U. S. 64, and *Guaranty Trust Co.* v. *York*, 326 U. S. 99. The teaching of those cases is accepted by me. They lead to the conclusion that in diversity cases, legal or equitable, and this proceeding is a diversity case, the federal courts in a state apply the law of that state in matters of substantive law. In matters of procedure and

jurisdiction, I take it, no one would contend that the doctrine of *Erie Railroad* is applicable. One may regret that the line of the Great Divide between substance and procedure cannot be clearly marked so that all may agree as to its location in any one case. But that line exists. We have said that federal courts must follow the law of the state as to burden of proof. *Cities Service Co.* v. *Dunlap*, 308 U. S. 208; *Palmer* v. *Hoffman*, 318 U. S. 109, 117; as to conflict of laws, *Griffin* v. *McCoach*, 313 U. S. 498; *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487, and as to state statutes of limitation in equity cases, *Guaranty Trust Co.* v. *York*, *supra*. The reason for these conclusions is to gain the desirable end of a symmetry of law within each state. The momentum of the opinions, just cited, and of the desire for uniformity should not cause us to disregard the rule that state law, statutory or judicial, directed at remedies or powers of courts, cannot affect the federal system. Each of the cases just cited follows the declarations of state law by state courts. In this case, this Court departs from the state court's interpretation of the meaning of a state statute in order to bring about the federal policy of uniformity. By this, the Court departs from the sound rule that a state court's interpretation of state statutes is binding on federal courts. In reaching the conclusion which it does, this Court decides that if a state court does not have power to adjudicate a cause, neither does a federal court in that state. It also departs from controlling precedents that state enactments on jurisdiction, remedies and procedures do not affect the jurisdiction, remedies or procedures of federal courts. It is true that these antedate the *Erie* case but that case did not change the state and federal jurisdiction.

In *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491, this Court held that an authority given by Delaware to its Chancellor to appoint a receiver for an insolvent corporation on the application of any creditor did not give additional power to the federal court to appoint a receiver in

a diversity case on the application of a simple creditor although the federal courts had long exercised the right to appoint receivers on the application of a secured creditor. This Court said:

> "That a remedial right to proceed in a federal court sitting in equity cannot be enlarged by a state statute is likewise clear. *Scott* v. *Neely*, 140 U. S. 106; *Cates* v. *Allen*, 149 S. 451. Nor can it be so narrowed, *Mississippi Mills* v. *Cohn*, 150 U. S. 202; *Guffey* v. *Smith*, 237 U. S. 101, 114. The federal court may therefore be obliged to deny an equitable remedy which the plaintiff might have secured in a state court. Hanssen's contention is that the statute does not enlarge the equitable jurisdiction or remedies; and that it confers upon creditors of a Delaware corporation, if the company is insolvent, a substantive equitable right to have a receiver appointed. If this were true, the right conferred could be enforced in the federal courts, *Scott* v. *Neely*, 140 U. S. 106, 109; since the proceeding is in pleading and practice conformable to those commonly entertained by a court of equity. But it is not true that this statute confers upon the creditor a substantive right."

See *Henrietta Mills* v. *Rutherford Co.*, 281 U. S. 121, 127–128; *Kelleam* v. *Maryland Casualty Co.*, 312 U. S. 377, 382.

In *David Lupton's Sons* v. *Auto Club of America*, 225 U. S. 489, this Court held, that a contract which could not be sued upon in the courts of New York because a New York statute provided that no foreign corporation could "maintain any action in this state" without a certificate that it had complied with certain state requirements to do business in the state, could nevertheless be sued upon in the federal court. It was said, p. 500:

> "The State could not prescribe the qualifications of suitors in the courts of the United States, and could not deprive of their privileges those who were entitled under the Constitution and laws of the United States to resort to the Federal courts for the enforcement of a valid contract. . . . The State in the statute be-

> fore us made no such attempt. The only penalty it imposed, to quote again from the *Mahar Case*, was a disability to sue 'in the courts of New York.' "

These cases make clear that in diversity litigation the federal courts are not simply courts of the state. They are so far as the enforcement of the substantive laws of the state are concerned, but not when procedure or power to act is involved. The *Lupton Case* shows too, that when a state denies power to its courts to adjudicate a cause, that denial does not affect the power of the federal courts to decide the case. As I am of the opinion that the state court merely denied its power to adjudge between these parties and did not decide the merits of Bullington's cause of action, the state court judgment cannot be *res judicata* in the federal court.

If it is true that in passing upon the meaning of a state statute, a federal court is not required to follow the state court's characterization of its statute, as remedial or substantive, this Court's present determination that the statute is substantive for our purposes cannot change the effect in this litigation of the state's decision to the contrary. When the state court held that for its purposes the statute was remedial, it was remedial in that court. If remedial, the state judgment was not upon the merits and could not be *res judicata* in any court as to the right to recover on the cause of action.

If the plea of *res judicata* is not good and this Court should decide that the state statute is substantive law, *i. e.*, a declaration of the policy of North Carolina against claims on deficiencies after sales of incumbered property, it would be necessary to determine the constitutionality of the North Carolina statute that declares uncollectible in North Carolina a claim on a contract that was good in Virginia. In view of this Court's present decision, I express no opinion upon this issue.

MR. JUSTICE JACKSON joins in this opinion.

Mr. Justice Rutledge

SUPREME COURT OF THE UNITED STATES

No. 31.—October Term, 1946.

Dr. Furman Angel, Petitioner,
v.
W. H. Bullington.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[February 17, 1947.]

Mr. Justice Rutledge, dissenting.

This is a hard case making, I think, proverbially bad law. On the surface what seems to be decided is simply a question of *res judicata*. Actually the decision rests on an "and/or" hodgepodge of *res judicata* and *Erie* doctrines.[1] In my judgment the admixture not only is unnecessary but distorts and misapplies both doctrines. If *res judicata* properly applies and is adequate to dispose of the cause, there is no occasion for the sidewise introduction of *Erie* ideas. Likewise, if *Erie* appropriately governs the case, the Court's elaborate and altogether novel discussion of *res judicata* is superfluous.

The Court has not decided this case on any basis of full faith and credit.[2] Accordingly *res judicata* as it is applied

[1] *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64.

[2] The Court does not hold that the full faith and credit clause, Const., Art. IV, § 1, binds the federal courts to give the North Carolina judgment the effect of precluding a further suit in the federal courts on the substantive cause of action. Two difficulties would arise: (1) If, as the Court asserts, the federal court in diversity cases were only "another North Carolina court," the full faith and credit clause would have no application; but, that it may, see *Cooper* v. *Newell*, 173 U. S. 555, 567, ". . . the courts of the United States are tribunals of a different sovereignty, and exercise a distinct and independent jurisdiction from that exercised by the state courts, and this is true in respect of the courts of the several States as between each other. And the courts of the United States are bound to give to judgments of the state courts the same full faith and credit that the courts

has neither constitutional nor statutory status. For present purposes it is therefore purely a rule of judicial administration to be applied, like all such rules, as considerations of justice and right application of the policy require, not omitting due regard for its appropriate limits.

Res judicata is a generally sound but by no means unlimited policy of judicial action. The doctrine is grounded in the need for putting an end to litigation.[3] It does this by precluding the parties from showing what is or may be the truth.[4] The sound core of the policy is that ordinarily one suit which determines or gives a full and fair chance for determining causes of action and issues[5] between litigants should be enough and when this much has been given further opportunity should be denied.

Stated so simply, however, the doctrine would be as much trap for the unwary as boon for the wise or lucky litigant. Exceptions and qualifications are so numerous as to make the field not only technical but treacherous, this case being a nice illustration. Qualification may

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of one State are bound to give to the judgments of the courts of her sister States." See also *American Surety Co.* v. *Baldwin*, 287 U. S. 156, where Mr. Justice Brandeis spoke of the full faith and credit clause in connection with the obligation of a federal court sitting in Idaho to follow, as *res judicata*, a previous Idaho decision. (2) The decision would contradict, not confirm, as full faith and credit require, the basis for the North Carolina court's judgment, namely, that the statute does not outlaw substantive claims but only deprives the state courts of power to entertain them.

[3] See Von Moschzisker, Res Judicata (1929) 38 Yale L. J. 299, 300. In this respect, of course, *res judicata* resembles both statutes of limitations and the doctrine of laches in equity, as well as full faith and credit when applicable to judgments.

[4] Scott, Collateral Estoppel by Judgment (1942) 56 Harv. L. Rev. 1. So do statutes of limitations, laches and full faith and credit *re* judgments, when applicable.

[5] Cf. note 9 *infra* and text.

itself lose sight of basic policy and become sheer technicality.[6] But general rules are not qualified so extensively as this one has been without reason. There is good reason for much of what has been done in this respect with *res judicata*.

The effect of the rule qualifies its scope. It is not every case in which a litigant has had "one bite at the cherry" that the law forbids another. In other words, it is not every such case in which the policy of stopping litigation outweighs that of showing the truth. This is so not only where the first suit actually gives no real chance to secure a substantial determination,[7] but also though less generally of others in which the litigant has such a chance and foregoes or misses it.[8] It is so too whether the claimed estoppel by prior suit is "direct" or "indirect," that is, on the same or a different cause of action.[9]

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[6] A sign generally that something is radically wrong with the rule or with it and the exceptions together. Cf. *Georgetown College* v. *Hughes*, 130 F. 2d 810.

[7] See *Walden* v. *Bodley*, 14 Pet. 156, 161; *Hughes* v. *United States*, 4 Wall. 232, 237; Restatement, Judgments (1942) § 49.

[8] "Judgments of nonsuit, of non prosequitur, of nolle prosequi, of discontinuance and of dismissal generally, are exceptions to the general rule that when the pleadings, the court, and the parties are such as to permit of a trial on the merits, the judgment will be considered as final and conclusive of all matters which could have been so tried." 2 Freeman, Judgments (5th ed.) 1579–1580. And "generally speaking, judgments merely of dismissal, whether voluntary or involuntary, in actions at law are not on the merits and do not operate as a bar or estoppel in subsequent proceedings involving the same matters." *Id.* at 1582. See *Haldeman* v. *United States*, 91 U. S. 584; *Jacobs* v. *Marks*, 182 U. S. 583; *Manhattan Life Ins. Co. v. Broughton*, 109 U. S. 121; Restatement, Judgments (1942) §§ 53, 54.

[9] Scott, *op. cit. supra* note 4, p. 2; Restatement, Judgments (1942) 175–176. Usually "direct" estoppel is said to preclude redetermination of issues actually determined or which might have been determined "on the merits." *Ibid.* But "indirect" estoppel precludes relitigating only issues actually decided. *Cromwell* v. *County of Sac*, 94 U. S. 351, 352–353.

Upon the law as well as the policy, the question has been one of balancing considerations of justice and convenience between stopping litigation and stopping the showing of the truth.[10] That balance has never been so one-sided in favor of the former that the matter is ended simply by showing that a party has had some chance, however slight, in a previous litigation to secure a favorable decision.

If this were the law every case where a party takes a nonsuit or a dismissal expressly for the purpose of starting over again would be a final and conclusive determination against him. I know of no jurisdiction where the law has been so harsh. Nor do I think it should be in this one.

There are too many good reasons why persons starting out in litigation should not be barred of their rights by the fact alone that they withdraw in order to start again, even though by going on to the end they might pull through successfully against great odds. Crucial witnesses may disappear or die and time be required for finding them or others. Surprise in the course of trial may occur justifying withdrawal without fatal loss of rights. Even as in this case, jurisdictional and other uncertainties may arise putting in jeopardy or making comparatively or completely futile further pursuit of the pending litigation when another suit in the same or a different court might provide a more certain and less expensive mode of disposing of the controversy for all the parties.

These and other reasons have qualified flat application of *res judicata* too long and too universally for their qualifying effects to be thrown overboard now simply because

[10] The process of course crystallizes in definite rules for types of cases, but the important fact is that these rules do not all come out the same way for application of the rule of preclusion and that in the process of crystallization the weighing of the opposing considerations forms the rule for or against that policy.

a withdrawing litigant might conceivably have come out victorious had he gone on to the very farthest end.[11] Such a criterion would turn *res judicata* into a rigid rule requiring exhaustion of judicial remedies, a notion heretofore wholly alien to the doctrine.[12]

This course, moreover, seems to be justified on the basis that the grounds of an adjudication have nothing to do with the adjudication or its effects, for purposes of applying *res judicata*. That is true, apparently, for applying *res judicata* to Bullington's failure to take his appeal here in the North Carolina state court suit, so as to cut off his right ever to secure a decision on the " 'merits' in the sense of the ultimate substantive issues of a litigation." But it is not true, apparently, for application of the doctrine to different jurisdictional rulings. For "an adjudication declining to reach such ultimate substantive issues may bar a second attempt to reach them in another court of the State. Such a situation is presented when the first decision is based *not on the ground* that the distribution of judicial power among the various courts of the State requires the suit to be brought in another court in the State, *but on* the inaccessibility of all the courts of the State to such litigation. And that is the essence of the present case." (Emphasis added.)

I can understand the distinction drawn. But I find difficulty in understanding why *res judicata* turns for

[11] The Court clearly implies that Bullington would not be foreclosed on *res judicata* by the North Carolina decision if his route to this Court for review had been by certiorari rather than by appeal. But the ruling as made, in so far as it rests on the failure to appeal, ignores the settled law that for purposes of applying *res judicata* failure to take appeal has no bearing once the judgment becomes final. See note 19. It also defeats the policy of *res judicata*; for a party, instead of being allowed to accept the jurisdictional ruling, is forced to appeal to the highest court in order to save his rights no matter how meritless the appeal, thus prolonging rather than shortening litigation.

[12] See note 19.

application in this case to cut off determination of substantive issues not at all upon the grounds of decision but only on the fact of adverse decision; but, for application to such issues when a jurisdictional question is also involved, it turns not simply upon the adjudication, but upon the grounds for the jurisdictional determination. If *res judicata* is governed solely by the adjudication without reference to what is adjudicated, that is, merely by the fact of adverse decision, I should think that rule would apply in all cases. If, on the contrary, the grounds of adjudication are relevant and controlling for the one class of questions, I should think they would be for the other.

The fallacy lies in the novel and unprecedented idea that the groundings of a court's decision have nothing to do with whether *res judicata* applies, except when they relate to one kind of jurisdictional determination rather than another. Apart from the exception, the idea ignores the vast body of law which has grown up on the basis that the grounding of the decision is the criterion for applying the doctrine.[13] And much of that case law has been that if the " 'merits' in the sense of the ultimate substantive issues of a litigation" are not reached, their later determination is not foreclosed.[14] This is true whether or not the jurisdictional ruling is erroneous or valid and whether or not if erroneous it might have been corrected on appeal.

That law I think is sound, and I think it is just as sound when the jurisdictional decision goes off erroneously on a federal ground or erroneously ignoring one as when it rests on a valid basis. It is grounded in the policy that unless a litigant gets a real bite at the apple of discord he should not be foreclosed from another attempt. Its basis is that in such a case it is better and more just not to stop litigation than it is to stop the showing of the truth and

[13] See Scott, *op. cit., supra* note 4; Restatement, Judgments (1942) §§ 49, 50, 53, 54.

[14] See authorities cited in note 7 *supra*.

thereby bring about a forfeiture of valuable substantive rights without giving at least one full and fair, which means fairly certain, opportunity for securing decision upon them.

Bullington has not had such an opportunity. He has never received, and now never can receive a decision on the substantive merits of his claim, unless possibly he can catch and serve Angel in another state and after prolonged further litigation succeed in inducing this Court to hold the North Carolina bar and *res judicata* not operative there. See *Riley* v. *New York Trust Co.*, 315 U. S. 343, 349: "By the Constitutional provision for full faith and credit, the local doctrines of *res judicata*, speaking generally, become a part of national jurisprudence, and therefore federal questions cognizable here."

Conceivably Bullington by coming here in the North Carolina suit might have secured a decision that the North Carolina statute and decision were invalid constitutionally in excluding him from all the state's courts and that the state must afford him a remedy on proof of his substantive claim. But the very multiplicity of the constitutional questions enumerated in the Court's opinion which were or might have been pertinent made that chance slim indeed. What is more important is that if the judgment had been thus reversed and remanded, it would have been wiped out and he then would have been free to dismiss the suit and start over again in the federal courts sitting in the state or in the state courts. *Bucher* v. *Cheshire R. R. Co.*, 125 U. S. 555, 578–579.[15]

[15] "If . . . a judgment has been vacated by the trial court or reversed by an appellate court, it is no longer conclusive between the parties, either as a merger of the original cause of action or as a bar to an action upon the original cause of action. . . ." Restatement, Judgments (1942) 163.

"Ordinarily, after a judgment has been reversed on appeal and the cause remanded, the case stands for trial de novo on the issues properly joined. . . . With respect to the right of plaintiff to take a voluntary

On the other hand, if the case had gone against him here, then his right to start over in the federal court in North Carolina would depend upon whether one of two grounds were accepted for this Court's decision, namely, on the one hand, that North Carolina had power to bar his substantive claim and had done so in effect though not in words, thus closing the doors of the federal court to it under the *Erie* rule; on the other, that the state had power to close its courts against his claim without adjudicating its substantive validity, thus leaving him free to go to the federal court under the *Erie* rule. Either result was a conceivable one, depending on whether the Court should conclude that a "right without a remedy" remains a right, for this purpose, or becomes none at all. But the only chance for Bullington's ultimate success, in the event of adverse decision here, would have been for the decision to have turned out on the latter ground.

That chance was hardly worth the gamble. For this Court has declared in *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 108–109, that a right without a remedy is no right at all for purposes of enforcement by a diversity suit in a federal court sitting in the state.[16] And the nature of the North Carolina statute as construed by the state court

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nonsuit, it stands in the same relative position which it occupied before the trial in the first instance." *Shell Petroleum Corp.* v. *Shore*, 80 F. 2d 785, 786.

This is the general rule. 89 A. L. R. 109; 126 A. L. R. 305. It would seem to apply in North Carolina. North Carolina follows both the doctrine that the trial court, upon remand by an appellate court, is to proceed as if there had been no previous trial and the doctrine that judgments not on the merits do not constitute an estoppel to subsequent actions. *Hickey* v. *Railroad*, 138 N. C. 311, 318; *Grimes* v. *Andrews*, 170 N. C. 515; cf. Gen. Stat. N. C. (1943) §§ 1-25, as interpreted in *Grimes* v. *Andrews*, 170 N. C. at 522.

[16] The *York* case however did not purport to apply or extend the rule to a cause of action arising under and governed by the laws of another state than that in which the federal court was sitting. But cf. *Klazon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U. S. 487.

reaches exactly the result which the *York* case says precludes resort to the federal court on the same cause in a diversity suit.[17] Indeed this seems to be an alternative basis for the present decision.[18] Bullington's chance to get to the federal court on such a basis was therefore practically nil.

Should he now be barred because he did not take the extremely remote chance of securing a favorable decision, reversing the state court's judgment and forcing the state to hear his case on the merits? Not, I think, unless we can say he then would have been forced, if successful, to continue the litigation in the state courts and could not withdraw to start over in the North Carolina federal court. This we could not say unless we were to overrule the *Bucher* case, which Bullington had a right to assume we would not do. Why he should be barred from doing now, because he did not take his almost hopeless appeal, what he would have been at liberty to do if he had taken it successfully, I am not able to understand. No sound policy of ending litigation, conserving judicial time or litigants' rights or in any other respect can possibly be served by such a ruling.[19] Moreover, the very difficulties in his way for securing a successful determination here, which would

[17] Except for the factor noted in note 16.

[18] See text *infra*.

[19] "The application of the principle of res judicata has not in any way been made to depend upon whether the judgment in question is subject to review in another tribunal. Except in so far as it may affect the question of its finality, as in the case of orders on motions, the fact that a judgment may or may not be appealable should have no bearing upon its effect as res judicata." 2 Freeman, Judgments (5th ed.) 1339.

Thus, there is no doctrine of exhaustion of judicial remedies. If the judgment of a court goes on jurisdictional grounds, the party may accept it and, instead of appealing, may institute another action where he will not be met by the jurisdictional bar. Cf. Restatement, Judgments (1942) 194–195; Cook, The Logical and Legal Bases of the Conflict of Laws (1942) 133–135.

give him some certain remedy either in the state or in the federal courts, were sufficient reason, in my opinion, to justify his foregoing that dubious procedure and starting over again in the federal court.

The real trouble here is not with the law of *res judicata*, for that law has no valid application to these facts. It is that the doctrine is used as an escape from facing squarely the real question presented. This is whether North Carolina's decision made the *Erie* doctrine applicable. The Court's opinion does state expressly that the effect of the North Carolina decision was to create a policy of the state against the validity of all claims for deficiency judgments, and comes almost but not quite to saying this requires the case to go off on application of the *York* rule.

That issue is inescapable here. The *Erie* rule did not purport to change the law of federal jurisdiction in diversity cases, taking it out of the hands of Congress and the federal courts and putting it within the states' power to determine. It purported only to prescribe the rule federal courts should follow in applying the substantive law. If the North Carolina decision was exclusively a jurisdictional one, it had no effect on the power of the federal courts in that state to hear controversies excluded by it from the state courts, and the decision neither reached the merits of the controversy "in the sense of ultimate substantive issues of a litigation" nor barred Bullington from going to the federal court. See *David Lupton's Sons* v. *Automobile Club*, 225 U. S. 489. If on the other hand the decision was in effect, although not in words, a determination of the merits in that sense, it both adjudicated Bullington's substantive rights and barred him from maintaining the later suit successfully in the federal court. That question is here and until it is resolved he is deprived of any day in court except to go from one to another without securing decision either on the merits substantially or "on the merits" jurisdictionally.

From the Court's opinion I cannot say whether the question has been resolved. Its discussion of North Carolina's "policy" and its overruling of the *Lupton's Sons* case, supra, would seem to indicate that it is applying *York*, though without saying so frankly. But, if so, why speak also of *res judicata*? The law should not be made into such a merry-go-round. Bullington is entitled to one full day in court on the substance of his claim. This he has not had.

I hardly need add that I agree with the views expressed by MR. JUSTICE REED.

MR. JUSTICE JACKSON joins in this opinion.